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ALEXANDER L. STEVAS,

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALVIN W. SMITH, PETITIONER

VS.

HONEYWELL, INC. A DELEWARE CORPORATION, AND HONEYWELL INFORMATION SYSTEMS, INC. A DELEWARE CORPORATION, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, pro se,

Alvin W. Smith
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QUESTIONS PRESENTED

1. Whether and to what extent there was a lack of substantial justice when the U.S. District Court allowed petitioner's attorney to abandon this case just before trial without the court's permission and without a subsitute attorney forcing petitioner to act pro se during trial.

2. Whether and to what extent there was a lack of substantial justice during trial when the district court disparaged petitioner forced to act pro se while he was on the witness stand.

3. Whether and to what extent there was a lack of substantial justice when the U.S. District Court issued jury instructions which only addressed 50% of the issues in the complaint.

4. Whether and to what extent there was a lack of substantial justice when the U.S. District Court issued substantially erroneous findings of fact and did not consider

the evidence of pretext as required under Title VII, 42 USC Sec. 2000e et seq. (Civil Rights Act of 1964).

5. Whether the U.S. District Court committed a error when it directed the jury to determine the state of the mind of the discriminator rather than look at the purposeful acts of discrimination under the Civil Rights Act of 1866 (42 USC Sec. 1981).

THE PARTIES

The Petitioner

The petitioner, Alvin W. Smith (hereinafter referred to as petitioner or Smith) is a Vietnam War veteran honorably dischaged as a Captain in the Military Police Corp. The petitioner has a B.S. in mathematics, some graduate applied mathematics, a M.B.A. from the University of Minnesota, and a J.D. from William Mitchell College of Law in Minnesota. Petitioner is not an attorney but rather an expert in computer business. Petitioner is presently employed by Control Data Corp. in Minnesota as a consultant in supercomputer software development. Petitioner is a member of the Negro Race.

The Respondent

The respondent Honeywell, Inc. and its wholly owned subsidary Honeywell Informaton Systems, Inc. (both hereinafter referred to as respondents or Honeywell) is a multinational Minnesota based Corporation. Respondent is a major and influential employer in Minnesota.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A writ of certiorari is respectfully sought to review the judgement of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Appendix, infra, pp. 46-55)is reported in 735 F.2d 1067. The opinion of the United States District Court for the District of Minnesota unreported.

JURISDICTION

The judgement of the U.S. Court of appeals for the Eighth Circuit (hereinafter referred to as the Court of Appeals) was entered on June 4, 1984. The denial of the petition for rehearing in the Court of Appeals was entered on July 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). This petition is submitted because:

1. The Court of Appeals has sanctioned a lower court's departure from accepted judicial procedure and fairness necessitate a call for the U.S. Supreme Court's power of supervision.

2. The Court of Appeals has decided not to address an important question of federal law and which should be decided by the U.S. Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Civil Rights Act of 1866, 42 U.S.C. Sec. 1981 (hereinafter referred to as Section 1981) is a codification of the

Thirteenth Amendment to the U.S. Constitution provides:

> "All persons within the jurisdiction of the United States shall have the same right...to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishemnts, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

2. Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Sec. 2000e. et seq. (hereinafter referred to as Title VII) provides:

> "Sec. 703. (a) It shall be unlawful for an employer...(1)to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his composition, terms, conditions, or privileges of employment, because of such individual's race, color...or (2) to limit, segregate or classify his employees...in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, be cause of such individuals race, color, religion, sex, or national orgin."

STATEMENT OF THE CASE

This is an individual action for race discrimintion for violation of Title VII and Section 1981. Petitioner brought action against respondents for fraudent employment, wrongful termination and employment discrimination.

Petitioner was fraudently hired by the respondents from a competative company. He suffered disporportinate racial discrimination in assignment of responsibilities, office space, performance appraisals, salery treatment, promotional opportunities, use of employment benefits (i.e. vacation, etc.), job responsibilities, another segregated office and involuntary termination. There is no direct evidence of petitioner not performing his job.

This case was filed on June 2, 1981 by petitioner's then attorney, Mr. Steven M. Goldfarb, in the United States District Court in Minneapolis, Minnesota. The case was assigned to U.S. Judge Edward Devitt (hereinafter referred to as Judge Devitt)

of the U.S. District Court in St. Paul, Minnesota. On May 14, 1982, the case was referred to U.S. Magistrate Patrick C. McNulty (hereinafter referred to as the Magistrate) of the U.S. Court in Duluth, Minnesota.

The complaint initially consisted of five counts of employment related matters. In early 1982, Judge Devitt dismissed Count V (Unlawful Termination) as being beyond the court's pendant jurisdiction. On October 13, 1984, the Magistrate recommended dismissing Counts;I (Fraudent Employment), III (Minnesota Human Rights) and V (Minnesota Statute) as beyond the Court's pendant jurisdiction.

On October 25, 1982 (the last date to move against the Magistrate's recommendation), petitioner's attorney of 18 months abandoned this case without permission of the court and in violation of the employment contract. Petitioner could not find another attorney willing to take the case close to trial and was forced act as own lawyer in all further

legal actions in this case. Petitioner is not a lawyer but rather a computer expert. The incompetent presentation at trial was noted by the Magistrate.

On December 6, 1982, Judge Devitt ruled against the petitioners motion against the magistrate's recommendations. All of the counts dismissed in federal courts are being litigated in state courts.

On December 14, 1982, this action was referred to the Magistrate for trial with appeal to the Court of Appeals. The trial started on February 7, 1983 and lasted for 8 days. Count II (Title VII) was tried to the bench and Count IV (Section 1981) was tried to the jury.

Petitioner was forced to represent himself at trial. Petitioner did hire a lawyer to question petitioner while he was on the witness stand and provide sporadic trial consultation. Respondent was represented by 2 full time attorneys.

Petitioner lost the jury verdict 7 to 8. The Magistrate subsequently ruled against

the petitioner for the portion tried to the bench.

Petitioner thereafter moved for judgement notwithstanding the verdict, for new trial of the 1982 issue, to amend the court's findings of fact and for new trial of the Title VII issue. On May 5, 1983, these motions were denied by the Magistrate.

Petitioner then appealed to the Court of Appeals. On June 4, 1984 after not having oral argument, the appeal was summarily denied. Petitioner then requested the Court of Appeals rehear the evidence of errors in the findings of fact and rehear en banc the issue of proof of Section 1981 discrimination. On July 17, 1984 the Court of Appeals denied both of these request for rehearing.

REASON FOR GRANTING THE PETITION

Petitioner submit that the U.S. Supreme Court should exercise its power of supervision over a lower court to insure that; (1) a district court must not condone an

attorney abandoning his client without the court's permission thereby prejudicing his client's right of action, (2) a district court must not make disparaging remarks in the presence of the jury which would have the effect of influencing the jury against the individual forced to represent himself, (3) a district court must present to the jury all of the issues in the complaint supported by evidence and not a substantial subset, (4) a district court's findings of fact must be based on the evidence presented at trial, and (5) a district court in a Title VII case must consider evidence of pretext.

In general,each of the above items for consideration has a potential of falling under the penumbra of judical discretion, when taken as a whole has the effect of a departure from the standard of substantial justice.

Petitioner further submits that in Section 1981 cases, the jury must be directed to evaluate the purposeful harmful

acts of discrimination and not the mental state of the discriminator.

1. A DISTRICT COURT MUST NOT CONDONE AN ATTORNEY ABANDONING HIS CLIENT WITHOUT A SUBSITUTE ATTORNEY AND WITHOUT THE COURT' PERMISSION.

Petitioner's attorney of 18 months abandoned this case just before trial without the court's permission and without a subsitute attoreny (other then the petitioner who is not an attorney). The attorney abandoned this case at a time when petitioner was forced to immediately take the case pro se to make a timely motion to save a part of his case. The court was informed by the petitioner in that motion that the attorney has abandoned the case wrongfully. Yet, the court took no action to stop the missrepresentation.

Petitioner could not find another attorney willing to take over the case just before trial after 18 months of pretrial activities. Petitioner was therefore forced to go to trial pro se and make all subsequent motions. He was forced as a

citizen to enter motions questioning the integrity of the judicial proceeding. He was forced to act in this capactiy while working full time and without clerical support.

This under-representation was manifested by errors in trial, errors in motions and typing errors in briefs. Plaintiff is a computer expert not an attorney. The Magistrate stated on page 3 of his findings:

> "This resulted in some rather strange modes of interrogation and the introduction of a good deal of evidence extraneous to the issue."

It is a long standing rule that leave of the court is necessary before an attorney may withdraw from a case. U.S. v. Curry, 4 U.S. 106 (1848). The courts and the Code of Professional Responsibility require that the attorney seek permission from the court and take steps to avoid foreseeable prejudice. Summers v. Thompson, 444 F.Supp. 312 (Tenn 1978), Berry v. Berry, 388 A.2d 108 (Mo. 1978), Ashbrook v. Ashbrook, 366 N.E. 2d 667 (Ind. App. 1977), Code of Professional Responsibility DR 2-110(A).

This issue was not addressed by the Court of Appeals other then noting that petitioner was acting pro se.

Clearly, it is a prejudical error for the District Court to condone an attorney abandoning his attorney wihtout the Court's permission.

2. A DISTRICT COURT MUST NOT MAKE DISPARAGING REMARKS IN THE PRESENCE OF THE JURY WHICH WOULD HAVE THE EFFECT OF INFLUENCING THE JURY AGAINST THE INDIVIDUAL FORCED TO REPRESENT HIMSELF.

While petitioner was on the witness attempting to conduct his trial pro se and giving testimony by being questioned by a stranger attorney, the Magistrate sustained 14 objections to the testimony in the first day. There was no reason for some of the objections other than to interrupt the testimony,cast doubt on the issues in the complaint for which evidence was being presented, or to attack the credibiity of the pro se litigate.

The Magistrate also instructed the petitioner on the witness to testify about the testimony of other witnesses even

though the courtroom procedure was to exclude witnesses until after they testify (R1 Appendix pp. 56-57). The Magistrate even permitted the respondents counsel to question the petitioner on the witness stand about his planned trial tactics (R2 Appendix pp. 57-58). This gave the opposing side an unfair advantage by preempting the pro se litigate plans and tactics. The opinion of the pro se litigate about other witness remain within his providence as a litigator just as the opinion and trial tactics of a litigating attorney is within the providence of the litigating attorney.

The Magistrate discredited the petitioner on the witness stand by alluding before the jury that he would not believe the petitioner (R3 appendix pp 58-59).

Finally the Magistrate, for no apparent reason, threatened the petitioner in the presence of the jury with a contempt charge while the petitioner was on the witness stand. (R4 appendix pp. 60-61). This unfair tactic adversly effected the trial.

A "constitutional unfair trial" occurs where barriers and safeguards are so relaxed or forgotton that the proceedings are a spectacle rather than a trial. U.S. v. Augenbluck, 393 U.S. 348 (1969). The court has no duty to express opinion on nature, weight and effect of the evidence before the jury. Kelly v. Jackson, 31 U.S. 622 (1932). The credibility of the witness and the weight given to their testimony is for the jury. Kelly v. Johnson (supra). The jury has the duty to credit or discredit all or part of the witness testimony without the aid of the court. Moore v. Chesapeake & Ry. Co., 340 U.S. 573 (1951). This position is overwhelming supported throughtout the country.

The Court of Appeals felt that the remarks and rulings by the magistrate was not "sufficient to deny Smith a fair trial or to constitute reversible error". Improper remarks which are prejudicial or have a tendency to prejudice the minds of jurors against the unsuccessful party offer grounds

for a new trial. Snyder v. Mass., 291 U.S. (1934), Sawyer v. U.S., 220 U.S. 150 (1906), Haynes v. McLaughlin, 135 U.S. 584 (1889)

The effect of the Magistrate's action or lack of action was to prejudice the minds of the jury as well as to pre-empt the pro se litigate trial tactics. The trial was constitutional unfair.

3. A DISTRICT COURT MUST PRESENT ALL OF THE ISSUES IN THE COMPLAINT SUPPORTED BY EVIDENCE AND NOT A SUBSTANTIAL SUBSET.

At the conclusion of the trial, the Magistrate issued the following jury instructions:

> "The plaintiff claims that he was intentionally and purposefully discriminated against by both defendants because of his race.
>
> He claims that Honeywell Information Systems intentionally discriminated against him by -
>
> Hiring him for a job with one title and giving him a job with another.
>
> By providing him with office space which was less desireable then that allotted his white co-worker.
>
> He claims that Honeywell, Inc. unlawfully discriminated against him in regards to material aspects of his condition of employment, for instance-

Denying him office space comparable to that provided a white co-worker

Denying him the privilege of taking vacation time to study for law school exams.

Denying him travel necessary to do his job.

subjecting him to abusive language and other material aspects of the conditions of employment.

and

That Honeywell unlawfully terminated his employment."

The Magistrate identified 7 items for the jury to consider. There were 10 items in the complaint supported by evidence. The Magistrate also misstated 3 of the items in a prejudicial manner.

The Magistrate did not ask the jury to consider the following issues in the complaint.

1. Discrimination in compensation and benefits and the lack of a performance appraisal (paragraph 46(c) of the Complaint).
2. Discrimination in promotional opportunity (paragraph 46(D)).

3. Discrimination by giving plaintiff the title of manager without the responsibilities (paragraph 46(G)).

The Magistrate also misstated the following issues in a prejudicial manner:

4. Making false statements to induce plaintiff to join the company and these statements were not used against other new employees (paragraph 46(A)).

The Magistrate said:

"hiring him for a job with one title and giving him a job with another"

The effect is to belittle the issue.

5. Making great controversy over plaintiff's use of vacation time (paragraph 46(E)).

The Magistrate said:

"denying him the privilege of taking vacation time."

The issue was the sudden controversy when plaintiff wanted to take a legal vacation. Again the effect was to belittle the issue.

Therefore, the jury instructions presented by the Magistrate did not reflect

5 of the 10 issues in the complaint or 50% of the issues in controversy. The net effect is to belittle the complaint and not really bring all of the issues supported by evidence to the jury.

The Court of Appeals ruled that this allegation was not preserved for appellate review sence the petitioner pro se did not make the formal Rule 51 motion and that there was no error which "seriously affected the fairness, integrity or public reputation of judicial proceedings."

It is widely held that the court has a duty to submit all of the issues to the jury. Ranney v. Barlow, 112 U.S. 207 (1884), Herman v. Midland A.G. Service, Inc., 264 N.W.2d 161 (Neb. 1978), Cole v. Woods, 548 S.W.2d. 640 (Tenn. 1977), Hasson v. Ford Motor Co., 564 P.2d 857 (Cal. 1977).

Petitioner not being an attorney yet forced to act on his own behalf, was not aware of the formal Rule 51 objection. The objection would have obviously been made if he had been aware of its existance.

Petitioner's proposed jury instructions requested that the Court present all of the issues in the complaint to the jury and not a substantial subset.

In summary, an unfair error occurred when the Magistrate presented only 50% of the issues in the complaint to the jury. This unfairness was furthered by the prejudicial misstatement in the jury instructions. This is further illustration of the constitutional unfairness of this judicial proceedings.

4. IN SECTION 1981 CASES THE JURY MUST BE DIRECTED TO CONSIDER THE PURPOSEFUL HARMFUL ACTS OF THE PERPETRATOR AND NOT HIS/HER MENTAL STATE.

The issue here is the confusion in the definition of discrimination of Section 1981 discrimination. The heart of the judicial confusion is the distinction between "intent to discriminate" and "purposeful discrimination". At trial the Magistrate specifically instructed the jury to determine the intent to discriminate in the following jury instructions:

"The plaintiff's claim against the defendant in this case has three (3) essential elements, as follows:

FIRST: That the defendant intentionally discriminated against the plaintiff in connection with his employment, or with respect to termination of employment;

SECOND: That the effective reason for such intentional discrimination was the race of the plaintiff; and

THIRD: That as a direct result of such intentional discrimination, the plaintiff sustained damages.

Plaintiff has the burden of proving each of these essential elements by a preponderence of the evidence."

The Magistrate stated the following in his jury instructions:

"Intent ordinarily may not be proven directly because there is no way of fathoming or scrutinizing the operation of the human mind. But you may infer a person's intent from the surrounding circumstances. You may consider any statement made or act done or ommitted by a party whose intent is in issue, and all other facts and circumstances proven which indicate his state of mind."

Thus, the Magistrate specifically directed the jury to determine the state of the mind of the prepetuator of the harm. The inference is that if the actor did not mentally intend his act then there is

no racial discrimination.

A deranged mind may easly commit acts against individuals in a society without knowingly intending to commit the acts. The harm remains in spite of the state of the mind of the perpetuator.

Then using the above jury instructions, a deranged mind who commits an act of racial discrimination against another individual is not guilty of racial discrimination because he did not knowingly intend to racially discriminate. Yet, the victim of the racial discrimination suffered the burden of the act of racial discrimination whether or not the deranged mind was aware of his/her act.

Obviously Section 1981 exist to protect the victim from the harm of racial discrimination. Section 1981 is not intended to protect the racial discriminator's state of mind or thinking process. Indeed the individual has freedom to think anything he/she wishes, it is only when they act in racially discriminatory manner that the protection under Section 1981 is envoked.

The definition of Section 1981 discrimination is emboded in the words "purposeful discrimination' implying the act of discrimination. The U.S. Supreme Court discussed the dichotomy between the act and the state of mind of the actor in the case General Building Contractors Ass's v. Penn., 458 U.S. 375 (1982). There the Court stated the following starting on page 3148:

> "of course, this Court has found in the legislative history of the 1866 Act evidence that Congress sought to accomplish more then the destruction of state imposed civil disabilities and discriminiatory punishments. We have held that both §1981 and §1982 "prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein... Nevertheless, the fact that the prohibitions of §1981 encompass private as well as governmental action does not suggest that the statute reaches more than purposeful discrimination, whether public or private. Indeed, the relvant opinion are hostile to such implication...we explained that in §1 of the 1866 Act 'was ment to prohibit all racially motivated of the rights enumerated in the statute' ...the immediate evils with which the Thirty-ninth Congress was concern simply did not include practices that 'neutral on their face, and even neutral in terms of intent' Griggs v. Duke Power Co., 401 U.S. 424...(1971), but that had the incidental effect of disadvantaging blacks to a greater degree

than whites. Congress instead acted to protect the freedmen from intentional discrimination by those whose object was to make their former slaves dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices'... The supports of the bill repeatedly emphasized that the legislation was designed to eradicate blantant deprivations of civil rights, clearly fashioned with the purpose of oppressing the former slaves... Our conclusion that §1981 reaches only purposeful discrimination is supported by one final obervation about its legislative history...With respect to the latter, 'official actions will not be held unconstitutional soley because it results in a racially dis porportionate impact' Arlington Heights v. Metropolitian Housing Dev. Corp., 429 U.S. 252...(1977). 'Even if a neutral law has a disporportionately adverse impact' upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.' Personnel Administrator of Mass. v. Feeney, 442 U.S. 256...(1976)... We conclude therefore, that Sec. 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination"

There is nothing in that passage which enables the deranged minded racial discriminator from being not guilty of racial discrimination simply because his state of mind was such that he did not know what he was doing. The Court said again that it is the purposeful act of discrimination and

not the state of mind of the discriminator which defines Section 1981 discrimination. (note the underlined words of action in the above passage).

In spite of this, there is still confusion in the courts in defining Section 1981 discrimination as state of mind or purposeful act. They are equating intent to purpose in other words they are equating mental state to act.

The Court of Appeals in this case illustrated this confusion in the following passage:

> "Appellant also objects to the jury instructions on the ground that the definition of discrimination was misleading and confusing because the instructions "asked the jury to look at intent of the defendants rather than the purposeful act of the defendants." Smith seems to be drawing a distinction without a difference... The Supreme Court has clearly stated that liability cannot be imposed under Section 1981 without proof of intentional (or purposeful) discrimination."

It is now relevant to look at the historical growth of the definition of Section 1981 discrimination from intent to

purposeful act.

The U.S. Supreme Court in Washington v. Davis, 425 U.S. 299 (1976, adopted an evidence requirement of "discriminatory intent" for proving race discrimination under Section 1981. In a later case , Village of Arlington Heights v. Metropolitian Housing Development Corporation, 429 U.S. 252 (1977) (hereinafter referred to as Arlington Heights), the U.S. Supreme Court softened the requirement of proving discriminatory intent. On page 265 of Arlington Heights the U.S. Supreme Court stated:

> "Davis does not require plaintiff to prove that the challenged action rested soley on racial discrimination purpose. . . ...When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judical deference is no longer justified."

The U.S. Supreme Court does not require a plaintiff to prove that an allegedly discriminatory action was motivated soley by a racially discriminatory intent but now by a discriminatory purpose. Again it is the act and not the state of mind which

controls.

Indeed, on pages 266 and 268 in Arlington Heights, the U.S. Supreme Court said that intent could be inferred from, the totality of circumstances without a direct showing of discriminatory purpose. The U.S. Supreme Court said that relevant factors for making such an inference include groosly disporportionate impact from a series of official actions taken for an invidious purpose in departure from normal procedures.

On page 266 of Arlington Heights, the U.S. Supreme Court suggested that intentional discrimination may also be inferred in cases of gregarious impact when the Court stated "some times a clear pattern is unexplainable on grounds other than race emerges from the effect".

In the successive case ,Personel Administrator of Mass. et. al. v. Feeney, the U.S. Supreme Court said on page 2296:

> 'Discriminatory purpose, however, implies more than intent as violation

of intent as awareness of consequences"

In the more recent case, General Building Contractors Assn'n v. Penn. (Supra), the U.S. Supreme Court said on page 3150:

> "We conclude, therefore, that Sec. 1981 like the Equal Protection Clause, can be violated only by purposeful discrimination."

Yet, there is still confusion about the definition of Section 1981 discrimination. Petitioner request that the U.S. Supreme Court grant Certiorari in this matter and clearly define Section 1981 discrimination as purposeful discrimination rather than intentional (state of the mind) discrimination. Petitioner further request that the U.S. Supreme Court distinguish this definition by requiring the courts to direct the jury to look at the purposeful acts of discrimination rather than the state of mind of the discriminator.

In this case the District Court instructed the jury to determine the state of mind rather than whether or not the

the actions were racially discriminatory. The emphasis was strongly on the state of the mind. The District Court errored when it directed the jury to determine the state of mind of the perpetuator, it should have directed the jury to look at the purposeful acts of discrimination. If the purposeful acts of discrimination were considered the decision would have been reversed.(assuming a fair trial). Even with the erroneous instruction the juries' decision was not unanimous.

The effect of the erroneous instructions was to direct the jury to potentially ignore evidence of the acts of discrimination. There was no evidence presented about the psychological profile of the prepetuators nor should such evidence be required in a race discrimination case.

This issue was presented to the Court of Appeals in request for rehearing en banc. The Court of Appeals choose not to rehear the merits and denied the request.

5. A DISTRICT COURT'S FINDINGS OF FACT MUST BE BASED ON THE EVIDENCE PRESENTED AT TRIAL.

The Magistrate states on page 12 of his order that his "Findings of fact can be influenced by his interpertation of controlling law'. The findings of fact must be based upon evidence at trial and not upon a contrivance.

The presentation of the errors in the findings of fact was in tedious detail in the Appellate Brief. The Court of Appeal summarly stated that "the evidence support the magistrate's findings".

For the sake of brevity, this petition will present a representative sample of the type of substantial deviation from the evidence.

The Magistrate stated on page 20 of his findings that plaintiff-petitioner was terminated for insubordination. The following are his examples of the insubordination:

> "A number of other events occurred which resulted in heated exchanges, interspersed with profanity, between Griffin and plaintiff. These matters included plaintiff's complaint, real

or imagined exclusion from preparing performance evaluation for a secretary which he shared with Maidman, the untimely submission of travel expense and tuition payment request, and plaintiff sending unauthorized telex messages." All of these resulting in complaints by plaintiff that white employees were receiving better treatment than he was, and that he was being verbably abused. It is of interest to note that at no time was plaintiff subjected to racial slurs or language which differed in any way from that directed at other employees, or that he was being required to comply with rules and regulations which other employees could ignore, or which were not specific directions from his supervisor based upon sound managerial decision."

For illustrative purposes the items underlined will be used show the substantial deviation from the evidence.

Item 1. Heated exchanges with profanity

Evidence was presented that Mr. Griffin had heated exchanges with a number of persons to plaintiff-petitioner (R5 appendix pp 61), Mr. Maidman the petitioner white co-worker (R6 appendix pp 62) other employees (R7 appendix pp 62-63). in fact Mr Griffin testified that he used what he coined "waterfront language" in the professional office environment (R8

appendix pp 63-64). Plaintiff complained about the verbal abuse to the appropriate authorities (R9 appendex pp 64-65)and was told to work with it.

Petitioner was not the initiator of the profanity nor the escalator of the conflict but Mr. Griffin. This not what the above passage would have one believe.

Item 2. Evaluation of secretary Performace:

Evidence was presented that petitioner Causasian co-worker was permitted to evaluate the performance of the Caucasian secretary who worked for both managers (petitioner and the co-worker). (R11 appendix pp 65-66). The petitioner was not permitted to evaluate this individual's performance (R12 appendix pp 66). The above passage inferred that this incident was "imagined".

Item 3. Untimely submission of travel expenses

Evidence was presented that once petitioner was two weeks late in submitting

an expense report (R13 appendix pp 66-67) because plaintiff was waiting the receipt for a car rented in Scotland (R14 appendix pp 68). The director of personnel testified that waiting for a receipt was a justifiable reason for turning in as expense report late (R15 appendix pp 68-69). Mr. Griffin said that petitioner turning in the expense report two weeks late was a significant event (R16 appendix pp 69-70). Evidence was shown that plaintiff's Caucasian co-worker routinely turned in his expense reports as late as three months without it being called a significant event (R17 appendix pp 70). The Magistrate findings of fact was worded in such a manner as to infer that the petitioner routinely submitted late "travel expenses". He also did not consider the disporportionate treatment between the white and black employee.

Item 4. Untimely submission of tuition request

The petitioner paid for most of his

education by means of the G.I. bill and hard work. Respondant paid for approximately 3 semesters on the normal employee tuition reinbursement program. There was no evidence of an untimely tuition payment request. Evidence was presented that all tuition payment request submitted by the petitioner was on time and in accordance with policy. (R18 appendix pp 70-71). The Magistrate's findings of fact just is not true and unsupported by evidence.

Item 5. Sending unauthorized telex messages.

There is no evidence of sending unauthorized telex messages. Evidence was presented at trial that once petitioner sent a telex message to Angers France to enforce the U.S. export laws as required by his job and in accordance with the work direction of Mr. Griffin and that afterwards in a memo Mr.Griffin told petitioner to watch the export activity in France, but make sure that all telex were reviewed by him before being sent out (R19 appendix

pp 71-73, Griffin impeached). There is evidence absoultely followed this new work direction (R20 appendix pp 73) . There is evidence that petitioner's Caucasian co-worker did not have the requirement for Mr. Griffin to review his correspondence before being sent out (R21 appendix pp 73-74). Here again the Magistrate findings of fact is not true and not supported by the evidence. Again the Magistrate did not consider the disporportionate treatment between black and white employees.

. . .

This representative sample illustrate that the Magistrate Findings of Facts is not based on the evidence but rather a contrivance. Indeed, the Magistrate stated on page 16 of his order issued after denying the motion to amend his findings of fact that "Hindsight indicates that the Findings of Fact could have been presented in better form."

In conclusion, the findings of fact were an unfair and inaccurate representation of the evidence. This inaccuracy exceeded the normal expectation for the margin of human error.

6. A DISTRICT COURT MUST CONSIDER EVIDENCE OF PRETEXT IN TITLE VII CASES.

On page 19 of the Magistrate's Findings of Fact he stated the following:

> "proving that an articulated justification for an employer's action is pretext is no more than exposing a discriminatory motive. To prove pretext, plaintiff had the burden of showing a similarity between his conduct and that of white employees, and a disparity or difference in treatment of such conduct when committed by white employees and that which he received. Kendrick v. Commission of Zoological Subdistrict, 565 F.2d 524 (8th Cir. 1977). He has failed to do so. Instead, the evidence is overwhelming that plaintiff was treated no differently than any other employee by Honeywell, and that his discharge was for insubordination. Insubordination is a legitimate ground upon which to base a discharge. Guy v. Swift & Co., 612 F.2d 383 (8th Cir. 1980).

The Court of Appeals stated the following in the case Ward v. Arkansas State Police, No. 82-1757, (8th Cir. August 17, 1983):

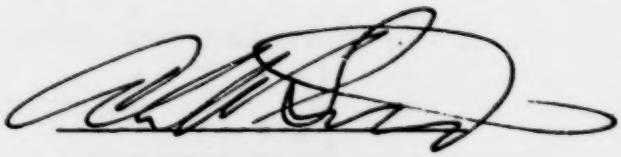
"the District Court to evaluate the evidence under the guidelines of McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Burdine sets forth the basic allocation of burdens and order of presentation of the proof in a Title VII case. First, the plaintiff must extablish by a preponderance of evidence a prima facie case of discrimination. Second, the burden shifts to the defendant to rebut the prima facie case by "explaining clearly" a legitimate, nondiscriminatory reason for its action. Finally, assuming a valid rebuttal, the plaintiff is entitled to prove by a preponderance of the evidence that defendant's reasons were merely a pretext. Texas Department of Community Affairs v. Burdine, 450 U.S. 252-56."

As shown above the evidence of pretext as defined by the Magistrate was not even considered nor was the evidence of disporportinate treatment considered. The Magistrate may have correctly stated the law but he did not apply the evidence. Again this is only one example, there were over a hundred citations of errors. The Magistrate simply did not consider the evidence as required in Title VII cases by both the U.S. Supreme Court and the Court of appeals.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.



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October 3, 1984

APPENDIX

Here set forth successively, the order by the U.S. Court of Appeals for the Eighth Circuit denying the petition for rehearing, the opinion of the U.S. Court of Appeals for the Eighth Circuit, and relevant portions from the trial transcript.

1067MN 735 FEDERAL REPORTER 2d SERIES
No. 83-1744-MN

Alvin W. Smith

v.

Honeywell, Inc., etc., et al.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

July 17, 1984.

No. 83-1744-MN

Alvin W. Smith

v.

Honeywell, Inc.

UNITED STATES COURT OF APPEALS
DOE THE EIGHTH CIRCUIT

Submitted: May 15, 1984

Filed: June 4, 1984

Before HEANEY, Circuit Judge, FLOYD R. GISON, Senior Circuit Judge, and ARNOLD, Circuit Judge.

PER CURIAM.

Alvin W. Smith brought this employment discrimination action under both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981. He alleges that Honeywell, Inc., and its subsidiary, Honeywell Information Systems, Inc. (Honeywell), discriminated against him because of his race in his initial hiring, in various action taken during the course of his employment, and in the decision to

to discharge him. After trial before a United States Magistrate,1/ the jury returned a verdict in favor of Honeywell on the §1981 claims, and the magistrate ordered judgement for Honeywell on the Title VII claims. Thereafter, Smith2/ filed a Motion for Amended Findings of Fact or a New Trial on his Title VII causes of action, and a Motion for Judgement N.O.V. or a new Trial on his §1981 cause of action. The magistrate denied the motions and Smith appeals.

1/ The parties consented to try the case before the Hon. Patrick J. McNulty, United States Magistrate for the District of Minnesota, pursuant to 28 U.S.C. §636(c)(1). Because Smith asserted the same facts in support of both claims, the parties agreed to try the case to the court and the jury simultaneously.

2/ Smith, a law school graduate, acted pro se at trial (though an attorney was present to assist him at various stages of the trial), and is proceeding pro se on appeal.

TITLE VII CLAIMS

Smith first contends that the trial court erred in denying him a new trial on his Title VII claims because the magistrate erroneously required him to show that Honeywell intentionally discriminated against him because of his race. Smith argues that a showing of intent is not required, and that to prevail he need only show that he was treated differently than other employees. This contention is without merit. A plaintiff alleging disparate treatment in a Title VII case has the burden of persuading the court that he is the victim of intentional discrimination. See, e.g. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); Craik v. Minnesota State University Board, No. 82-1930, slip op. (8th Cir. March 23 1984). The trial court did not incorrectly state the applicable law, nor did it abuse its discretion in denying the motion for a net trial on the Title VII claims.

Smith next contends that the trial

court erred in denying his motion for amended findings of fact because the magistrate's factual determination on his Title VII claims were not consistant with the evidence presented at trial and ignored relevant portions of his complaint. During Smith's eight-day trial, evidence was presented addressing numerous allegations of discriminatory treatment.3/ "(A) trial judge need not make specific findings on all facts nor refer to every item of evidence introduced in a leenthy trial...." Craik v. Minnesota State University Board, supra, slip op. at 10. In the present case, it appears that the magistrate

---

3/ Smith's complaint contains roughly ten separate allegations of discriminatory treatment by Honeywell, including claims that defendants provided him with undesirable office space; hired him for a job with one title and gave him a job with another; denied him travel necessary to do his job; subjected him to abusive language; and discriminated against him in promotional opportunities and other job benefits.

adequately considered the evidence presented at trial and the issues raised in the pleadings in arriving at his conclusions.

This Court may set aside factual findings about employer's discriminatory intent only if the findings are clearly erroneous. Pullman-Standard v. Swint, 456 U.S. 273 (1982). A finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). No such mistake is apparent in the case at hand. A review of the file and records indicates that the evidence supports the magistrate's findings. The trial court did not err when it denied Smith's motion for amended findings of fact on his Title VII claim.

SECTION 1981 CLAIMS

Smith argues that the trial court erred in denying the motion for judgement n.o.vv. on his §1981 claims because "sufficient evidence was presented at trial...to prove

discrimination." The reviewing court "may set aside a jury verdict only when there is no evidence of substance upon which reasonable persons could differ." Ybarra v. Burlington Northern, Inc., 689 F.2d 147,150 (8th Cir. 1982). The evidence must be viewed in the light most favorable to the jury's verdict, giving the prevailing party the benefit of all reasonable inference which may be drawn from the evidence. See, e.g. Harris v. Pirch, 677 F.2d 681,683 (8th Cir. 1982). Applying these principles, the evidence on the record was sufficient for the jury reasonably to conclude that Honeywell did not intentionally discriminate against Smith because of his race. Therefore, the trial court correctly denied the motion for judgement n.o.v.

Smith next asserts that he should have been granted a new trial on his 1981 claims because the jury instructions did not address all the issues in his cimplaint. This allegation of error has not been properly preserved for appellate review. Smith did not

requestadditional instructions about particular acts of discrimination, nor did he alert the trial court to the alleged omissions in a timely manner as required by Fed. R. Civ. P. 51. See, e.g., Missouri Pacific R.R, Co, v, Star City Gravel Co., 592 F.2d 455, 459 (8th Cir. 1979). Moreover any plain error exception to compliance with Rule 51 is "confined to the exceptional case where error has seriously affected the fairness, integrity or public reputation of judicial proceedings." Rowe International Inc. v. J-B Enterprises, Inc., 647 F.2d 830, 835 (8th Cir. 1981). No such error is demonstrated here. Most of Smith's contentions were presented to the jury, and the instructions taken as a whole were adequate to submit the substance of Smith's unlawful discrimination claim to the jury. He has therefore waived this objection on appeal.

Appellant also objects to the jury instructions on the grounds that the definition of discrimination was misleading and confusing because the instructions

"asked the jury to look at intent of the defendants rather than the purposeful act of the defendants." Smith seem to be drawing a distinction without a difference. Presumably, he is again raising the objection made at trial; that the instructions incorrectly imposed on the plaintiff the burden of proving by a preponderance of the evidence that defendants had a racially discriminatory purpose or motive, and that it was not sufficient for Smith simply to show that he was black and was treated differently. The Supreme Court had clearly stated that liability cannot be imposed under §1981 without proof of intentional (or "purposeful") discrimination. General Building Contractors Ass'n., Inv. v. Pennsylvania, 458 U.S. 375 (1982). Smith is not entitled to a new trial on his §1981 claims on this bases.

Smith further contends that he is entitled to a new trial because the special verdict form given to the jury did not accurately reflect all the issues in his complaint. The form directly asked the jury to

determine whether the defendants had unfully discriminated against Smith. The instructions adequately informed the jury about what constituted "unlawful discrimination." The record reflectr that Smith agreed to have the issues presented to the jury on a special verdict form, and did not raise a timely objection to any errors or omissions in that form. This issue has thus not been preserved for appellate review.

Finally, Smith charges that the disparaging actions of the magistrate prejudiced the presentation of his case to the jury. The record suggests that the magistrate was frustrated at times by appellnt's actions at trial, particularly Smith's conduct as a witness. The magistrate sustained a number of objections to unresponsive answers by Smith, and at one point said: "You lawyers are all alike. you don't listen to the question. Listen to the question and then answer that question." (Tr. Vol. IV p.77). Later the Magistrate ordered an unresponsive answer stricken. instructing

Smith "to answer the question or face a contempt charge." (Tr. Vol. IV p. 189). In context, it appears that neither these nor other remarks and rulings by the magistrate were sufficient to deny Smith a fair trial or to constitute reversible error.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

LEDFORD,SS. Civil Action
File No. 3-81-343

ALVIN W. SMITH,
PLAINTIFF

VS.

HONEYWELL, INC. ET AL.,
DEFENDANT

TRANSCRIPT OF TRIAL

Reference R1

Volume V page 67 line 6 (Alvin W. Smith)

Q:Do you remember Mr. Hough's testimony yesterday that he was to review his teleses with Mr. Griffin?

A: I cannot testify as to his testimony.

The Court: You can answer the question. Do you remenber that testimony?

The witness: Yes, I do remenber that.

BY MR. KAEHLER:

Q: what was racially discriminatory about Mr. Griffin asking to review your telexes?

A. Well, you ask me -- you're asking me to draw conclusions based on some other testimony, which I can't.

Q:You stated the conclusion is you were racially discriminated against. I'm asking what is the conclusion that that's based on?

A:I can only base my conparison again upon the white Mr. Maidman who stated that he wasn't required to copy Mr. Griffin on his telexes where I was...

Reference R2

Volume V page 101 line 10 (Alvin W. Smith)

Q:...Your claim is based on the evidence that has been presented to this court up to this date, is that part of it or not all of it?

A:There might be some other evidence we will bring in. I mean, I'just testifying now.

Q:Well, then, sir let's find out what other kinds of evidence you have.

A:I think you'll have to wait until I present it.

Q:Sir, I'm asking my question now.

A:What evidence I'm going to provide besides this?

Q:What further evidence of intentional purposeful motives of racial discrimination are you going to present?

A:I don't know how to answer it. I'm sorry. I don't know how to answer your question, sir. You're asking me to present a case to the jury while I'm sitting here. I can't do that.

Q:Do you have any other evidence?

A: Oh, yes.

Q:Of purposefully motivated intentional racial discrimination/

A:Yes, I do.

Q:What is that evidence Mr. Smith?...

Reference R3

Volume IV page 114 line 1 (Alvin W. Smith)

Q:...you were given a title but not sufficient responsibility to go with the title; is that correct?

A:That's correct.

Q:What specifically are you referring to there?

A:That specifically address the definition

of the export/import job as well as appraising an individual who worked for both Robert Maidman and myself.

Q:What titles specifically do you feel you were given but not given the responsibility that would go with it?

A: Well the title manager to some degree means that you can at least write an appisal for a secretary or be responsible for your job.

THE COURT:Is there a job description that's printed or written?

MR. OHNSTAD: Yes, there is.

THE COURT: Let's use it.

MR. OHNSTAD:I don't think it will mean anything to anybody if the Court is--

THE COURT:It will mean far more to me than what Mr. Smith thinks the job is.

MR. OHNSTAD:Do you know where that is? (note: he was speaking to the witness Mr. Smith)

THE COURT:It will mean far more than Mr. Smith's interpertation.

MR. ONHSTAD: I would like the witness to find it, if he can...

Reference R4

Volume IV page 187 line 25

Q:Did you have an occasion while you were employed at Control Data Corporation to file a charge of race discrimination against your supervisor, Douglas Scafe?

MR. OHNSTAD: I object, Your Honor. We have hit upon what we discussed this morning.

THE COURT: The objection is overruled.

MR. OHNSTAD: I offer a document for the Court to review if the Court--

MR. KAEHLER: There is no document that I'm talking about.

THE COURT:At the moment we haven't gotten to the document yet.

THE WITNESS: would you repeat the question.

MR. OHNSTAD: Just a minute. I think the Judge has ruled.

BY MR. KAEHLER:

Q:Mr. Smith, while you were employed by Control Data Corporation, before you left them in July of 1977, did you have occasion to file a race discrimination complaint regarding your supervisor, Douglas Scafe,

with Mr. English?

A:Y s, and he discovered it was discrim-
ination.

THE COURT:Just a moment, sir. That answer may be stricken. the jury is instructed to disregard it and you are again instructed to answer the question or face a contempt charge.-- Do you understand?

THE WITNESS:Yes sir...

Reference R5

Volume IV page 127 line 19 (Alvin W. Smith)

Q:At any time did Mr. Griffin ever call you a lier or dummy?

A:Yes, sir.

Volume IV page 125 line 18 (Alvin W. Smith)

Q;Did you ever swear at Mr. Griffin?

A:Only I think I may have used a word like damn, only after being shouted at for a while and being provoked.

Q:Now there apparently was some incident where he hollered at you about parking; is that correct?

A:That's correct...

Reference R6

Volume II page 174 line 20 (Mr. Maidman)

Q:Did Mr. Griffin ever shout and holler at you when the door was open?

A:I don't recall exactly, but I'm sure he did upon occasion.

Volume II page 170 line 12 (Mr. Maidman)

Q:Did Mr. Griffin ever lose his temper to you or of anyone else he was dealing with in your presence?

A:To me, yes, upon occasion....

Volume II page 171 line 14 (Mr. Maidman)

Q:Do you if Mr. Griffin had a tendency to be abusive toward people?

A:I'm sorry to ask you, but you have to define for me what you mean by abusive.

Q:Profanity?

A:Yes.

Q:In a loud tone of voice?

A:He would to me on occasion...

Reference R7

Volume III page 58 line 21 (Mr. Jensen)

Q:...Are you aware of any difficulties Mr.

Griffin may have had with other parties in the corporation such as Morrie Longsworth, Harry Sweatt?

A:I know I had trouble with him at one point. I also know that he was a very ambitious person...I recall one time over the phone he got extremely upset against me. He wanted me to do something and I did not choose to respond the way he apparently wanted me to respond, and he ended up shouting to me over the phone...

Reference R8

Volume II page 79 Line 8 (Mr. Griffin)

Q:Mr. Griffin, do you in the normal course abusive language with people?

A:Not in the notmal course, but I do use abusive language.

Q:Do you use abusive language with your people working for you?

A:From time to time.

Q:Mr. Griffin--

A:I worked for seven years on the waterfront for years in the Navy and seven years in

the factories, and you pick up vocabulary that you would not find in Webster's Dictionary.

Reference R9

Volume III page 21 line 7 (Mr. Amundson)

Q:Mr. Amundson, did...did Mr. Smith come to you complaining about the verbal abuse of Mr. Griffin?

A:In which particular time frame?

Q:At all, Mr. Amundson.

A;In the later stages of the discussions that we had you made comment on that, yes.

Q:What is Honeywell's policy about supervisors verbally abusing their employees.

...

A:I'm not aware that there is a specific policy, but there are particular views on the language that I am sure of. I haven't been in too many environments in my life where a few words that may be,you know, people find distasteful, but they're utilized. Swearing is certainly one of these...

Q:Would you say that swearing is inappropriate communication in your opinion?

A:No

Q:Mr. Amundson, do you remember taking your deposition on the 21st day of January, 1982?

A:Yes.

Q:On page 21, line 12 the question was placed:...

QUESTION:Well, yes. Not to swear in general but to swear at an employee in a fashion.

ANSWER:I guess I consider swearing to be inappropriate in the context of conversation in most instances...

Volume II page 145 line 12 (Mr. Remington)

Q:You continue to state that Mr. Smith told you that he was not about to take abuse and requested your help..What abuse was he talking about?

A:I don't know...

Reference R11

Volume II page 176 line 14 (Mr. Maidman)

Q:Did you write performance appraisal for

the secretary?

A:I was asked to write a performance appraisal as to how she was performing her job, but since we both Mr. Smith and I shared her services, I believe that both of us were requested to write that appraisal.

Q:Do you know if in fact Mr. Smith ever wrote a performance appraisal for her?

A:I have no idea. I know I did mine.

Reference R12

Volume IV page 121 line 19 (Mr. Smith)

Q:would you review her performance?

A:No, I didn't.

Q:were you permitted to do so by Honeywell Corporation?...

A:Well, I was not permitted to do so.

Q:By whom?

A:By either Bill Griffin or whoever it was responsible for making that decision.

Reference R13

Volume II page 20 line 8 (Mr. Griffin)

Q:Mr. Griffin what expense report are you speaking of in that form?

A:You made a trip in late June early July to Europe and there was a company policy and I think most people followed it that when you came back from a trip you filled out an expense report and you cleared up any cash advances that you might have open.

Q:Did Mr. Smith do that?

A:Generally,yes.

Q:Did he do it in that specific instances

A:No....(on page 22 line 7)

Q:Mr. Griffin, is this the expense report which you referred to as taking place in July?

A:Yes.

Volume IV page 143 line 20 (Mr. Smith)

Q:Were you late in submitting your expense reports?

A:I tried not to be, but there was a time of significance where I was late two weeks...(page 144 line 14)

A:I think I kept my expense reports turned in earlier because so I could get my money back earlier...

Reference R14

Volume II page 23 line 6 (Mr. Griffin)

Q:At that point in time, when you requested the expense report Mr. Griffin, did Mr. Smith state to you that he did not have a receipt for car rental?

A:At about the third request you did yes, he did.

Q:But then did you tell Mr. Griffin--Mr. Smith to submit the expense report nevertheless?

A:It's pritty common that if some one loses a receipt that you estimate the expense and you make an adjustment at some point in time.

Q:Did Mr. Smith state to you that he didn't have a receipt because he was waiting for a bill?

A:Yes, and he was told to submit the report with an estimated amount.

Reference R15

Volume III page 30 line 6 (Mr. Amundson)

Q:Mr. Amundson, if an employee was filling

out an expense report, an employee didn't have one of the receipts, would that be some justification for turning the expense report in two week late?

A:It might be.

Reference R16

Volume I page 83 line 23 (Mr. Griffin)

Q:Showing you what has been marked as Plaintiff's Exhibit Number 4 do you recognize that Document?

A:Yes....(page 84 line 13)

Q:Would you state the name of the document?

A:It says, it has the title at the top Summary of Significant Events-Al Smith. It has a date of July 22, 1980. I do remember dictating this document...

Volume II page 19 line 19 (Mr. Griffin)

Q:...Mr. Griffin, going back to Plaintiff's Exhibit Number 4, ...Would you please reread that paragraph again?...

A:July 22, 1980. "I questioned Al this day on why a tuition aid request for summer school was submitted three months late, and also why I still didn't have a trip

report and expense report covering a trip to Europe the first week of July. He spoke to me in a very condescending manner and inferred that he would take care of it at his convenience and not mine...

Reference R17

The Court is referred to Plaintiii exhibit number 41 which is a business record of the degree of tardiness for expense reports.

Reference R18

Volume I page 131 line 20 (Mr. Griffin

A:July 22, 1980 . "I questioned Al this day on why a tuition aid request for summer school was submitted three months late...

Volume I page 136 line 7 (Mr. Griffin)

Q:Mr. Griffin, which document, which tuition request were you referring to as three months late?

A:It's not here...

Volume II page 3 line 7 to page 19 line 11

This lengthy citation is the testimony of a very belligerent witness (Mr. Griffin) which shows that there no late tuition .

requests.

Reference R19

Volume VII page 120 line 3 (Mr. Griffin)

Q:Why did you write the memo to Harry Sweatt saying that you were sorry?

A:The sending of this telegram was contrary to the agreement I had made with Mr. Sweatt some months previously that we would use his organization as the window for communication in the French affiliate. This was a direct communication into the French affiliate.

Q:Was that telegram sent by Mr. Smith contary to your instructions?

A:Yes....(on page 126 line 14)

BY MR. SMITH

Q:Mr. Griffin, you testified a short time ago about a November 19, 1979 letter to Mr. Sweatt concerning the Angers Plant, did you not?

A:Yes....

Q:And the date of the Memo is November 19, 1979.

A:yes.

. . .

Q:Was it Mr. Smith's responsibility for part of his job to establish communication with Angers?

A:Yes.

. . .

Q:Mr. Griffin placing before you what has been marked as Plaintiff's Exhibit Number 48, what is the date of that memo?

A:November 27th, 1979.

Q:Who wrote that memo sir?

A:I did.

Q:To whom was the memo written?

A:To you.

. . .

Q:Would you read that memo, sir?

A:"Please keep me informed of all telexes, contacts, and correspondence in your efforts to establish a window into Angers. Also, please reviec any new contacts or correspondence with me prior to releasing it either to Longsworth's ...

Q:That's the direction you gave to Mr. Smith

A:It was one of the directions.

Q:What was the date of that letter, sir?

A:November 27, 1979.

Q:What is the date of the telex?

A:November 16th, 1979.

Reference R20

Volume Iv page 123 6 (Mr. Smith)

Q:Were you allowed to send telexes when you woeked for Honeywell Corporation?

A:Yes, Iwas.

Q:Did you have to submit them to anyone first?

A:I had to submit --at the end I had to submit mine to Bill Griffin, at the beginning I had to give a copy of them to Bill Griffin....(Line 16)

Q:Did Mr. Maidman also send telex?

A:yes, he did.

Q:Did he carbon copy Mr. Griffin?

A:Sometimes he did, sometimes he didn't.

Reference R21

Volume II page 170 line 23 (Mr. Maidman)

Q:Did you always inform Mr. Griffin of your communications that you have with people

you serviced?

A:As I thought necessary.

Office - Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS
CLERK

No. 84-594

In The

Supreme Court of the United States

October Term, 1984

ALVIN W. SMITH,

Petitioner,

vs.

HONEYWELL INC. and
HONEYWELL INFORMATION SYSTEMS INC.

Respondents.

On Petition For A Writ of Certiorari To The
United States Court of Appeals
For the Eighth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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67 pp

QUESTIONS PRESENTED

1. Whether the District Court committed error in allowing the petitioner to proceed pro se.
2. Whether the District Court committed error due to remarks made in the presence of the jury.
3. Whether the District Court committed error in its instructions to the jury.
4. Whether the District Court Findings of Fact on the petitioner's Title VII claims was based on the evidence.
5. Whether the standards of proof required of the petitioner in proving his claims under Section 1981 of the Civil Rights Act of 1866 was in error.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for Minnesota and that Court's opinion on petitioner's Motions for new trial, amended findings of fact, and judgment n.o.v. are unreported. Copies are included herein in the Appendix at pages 10a-26a, and 27a-42a. The opinion of the Court of Appeals is reported at 735 F2d 1067; its opinion on petitioner's Motion for rehearing and rehearing en banc is unreported. Copies are included in the Appendix at pages 3a-8a, and 9a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1984 (App. 3a-8a)[1] and Motion for Rehearing and Rehearing En Banc was denied on July 17, 1984 (App. 9a). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. The Civil Rights Act of 1866, 42 U.S.C. §1981:

> "All persons within the jurisdiction of the United States shall have the same right...to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended:

> "Sec. 703.(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[1]Citation to the Appendix herein.

STATEMENT OF THE CASE

This is an individual action claiming race discrimination in violation of Title VII of the Civil Act of 1964 and Section 1981 of the Civil Rights Act of 1866. The petitioner, Alvin Smith, a black male, (hereinafter "petitioner" or "Mr. Smith"), alleges that the respondents, Honeywell Inc. and Honeywell Information Systems Inc. (hereinafter "Honeywell" or "HIS"), intentionally discriminated against him on the basis of his race (black) in his initial hiring on July 7, 1977, in various conditions during his employment, and his termination on July 28, 1980.

After termination of proceedings before the U.S. Equal Employment Opportunity Commission on April 14, 1981, Mr. Smith filed his Complaint in the instant case on June 2, 1981, in the United States District Court of Minnesota. Therein he alleged a number of occurrences violated his rights under Title VII, and also asserted the same occurrences violated his rights under Section 1981. On October 14, 1982, in the course of pre-trial proceedings, the District Court's Magistrate recommended certain counts be dismissed.* On October 25, 1982, the petitioner consented to the substitution of himself as attorney pro se for his then attorney of record. On December 9, 1982 the Magistrate's recommendations were adopted and on December 15, 1982 the parties consented to trial before the Magistrate with direct appeal to the Court of Appeals. (App. 43a-47a.) In that the same facts were asserted for the petitioner's Title VII and Sec. 1981 claims, it was agreed that the case would be tried to the Court and jury simultaneously.

*The counts dismissed, as beyond the Court's pendent jurisdiction, were an allegation of false inducement in hiring under Minn. Stat. 181.64, an allegation of discriminatory employment practices under Minn. Stat. 363.01 *et seq.*, and an allegation of unlawful termination under Minn. Stat. 181.13 and 181.14.

Mr. Smith graduated from William Mitchell Law School in St. Paul, Minnesota, in January, 1981, but has not been admitted to practice before the bar. He was represented by counsel until he consented to the substitution of himself in a pro se capacity on October 25, 1982. Thereafter he has represented himself, but did employ an attorney to assist him at the actual trial. Mr. Smith did not object to these arrangements after October 25, 1982, or raise them as an issue for review in the Courts below prior to the instant Petition for a Writ of Certiorari.

An eight day trial was held between February 7 and February 17, 1983. During the trial, and at the close of evidence, both parties moved for dismissal and directed verdicts; the motions were denied. Thereafter, the Court reviewed its jury instructions and Special Verdict form with the parties, prior to charging the jury as to the petitioner's Section 1981 claims. The petitioner and his co-counsel *accepted* them, without objection, except to one stating: "...In order for plaintiff to establish his claim plaintiff has the burden of proving by a preponderance of the evidence that defendant had a racially discriminatory purpose or motive...." (Text of the instructions and the petitioners' objection is set forth in the Appendix at pp. 29a-31a, and 48a.)

The jury voted 7 to 1 that the respondents had *not* unlawfully discriminated against the petitioner under Section 1981, and the Court also found the petitioner's Title VII claims groundless and ordered judgment for the respondents. Thereafter, the petitioner filed motions for Amended Findings of Fact, Judgment n.o.v., and New Trial on his Title VII and Section 1981 claims. On May 4, 1983 the Court denied those motions, and the petitioner appealed that denial to the Court of Appeals. His appeal and motions for rehearing were denied on June 4 and July 17, 1984 respectively. (App. 27a-42a, 1a, and 3a-9a.)

The essential facts established at trial are set forth in the District Court's opinion. (See App. 13a-24a.) They show the petitioner to be well educated and relatively well paid. Shortly before joining Honeywell in 1977 he accused his former employer (Control Data Corporation) of race discrimination, although it had transferred, promoted, and given salary increases to the petitioner on several occasions. He left that company because his pay raises were too slow. Seeking a better opportunity, Mr. Smith contacted and was hired by Honeywell Information Systems (i.e. HIS, a subsidiary of Honeywell Inc.); he worked in HIS for 11 months until May 1, 1978 at which time he accepted a position with Honeywell as its Manager of Import and Export Administration. While employed with HIS the petitioner complained about his job title, office size, and supervisor's work direction—alleging, they were racially biased—and accusing his supervisor of bigotry. The Court below credited his supervisor's testimony that it was apparent Mr. Smith discerned a racial challenge in everything which concerned him or the manner of doing his job.

After transferring to the Honeywell organization things went smoothly for the first few months but, starting in January 1979, a series of incidents occurred over the next 18 months which resulted in clashes between the petitioner and his supervisor. The incidents complained of by Mr. Smith were controversies over a business trip, parking space, vacation time scheduling, business communications, office assignment, criticism by his supervisor, and things of that nature. The petitioner alleged the controversies occurred because of his race, made known his desire to be transferred, and aired his grievances to other persons on several occasions.

The situation was reviewed and investigated by Honeywell representatives throughout 1979 and 1980. Those reviews showed business reasons for actions taken by Mr. Smith's supervisor, that communications between them were poor, and that Smith's charges of race discrimination were without merit. They also showed Mr. Smith had unrealistic expectations and was becoming frustrated at not achieving them. Eventually, the petitioner's supervisor asked that Smith be removed from his position because of his unwillingness to accept direction and unsatisfactory attitudes. Two days later, on July 28, 1980, the petitioner was notified he was being placed on probation for unwillingness to follow directions, deterioration of job performance, and the continuing conflict and office discord it created. When the petitioner did not accept, it was decided Mr. Smith would not accept direction or change his attitude in the future and, therefore, he was terminated.

The Court below also found that the respondents articulated non-discriminatory business reasons for its actions, that there were no job openings available to which the petitioner could be transferred (although Honeywell made sincere efforts to do so), and there was no evidence of disparate treatment. It also found that the petitioner was hired by the respondents in July 1977 at $26,400.00 per year, received four pay increases, and was receiving $36,540.00 per year when he was discharged in July, 1980.

SUMMARY OF ARGUMENT

The petition for Writ of Certiorari should be denied. The petitioner has presented no special and important reasons why it should be granted, in that there is no showing that the Courts' decisions below: (a) are incorrect as a matter of law, (b) in conflict with another federal Court of Appeals on the same matter, (c) departed from the accepted and usual course of judicial proceedings, or (d) decided an important question of federal law which has not been settled or in conflict with applicable decisions of this Court. *Rule 17 of the Rules of the Supreme Court.*

ARGUMENT

1. The Courts did not commit error by permitting the petitioner to proceed pro se, and he has not been denied substantial justice.

The record shows that the petitioner, a law school graduage, voluntarily consented to the substitution of himself for his attorney of record approximately 3 months before trial commenced. (App. 44a-45a.) Mr. Smith complains now (for the first time) this condition should be cause for reversal, even though he has not previously made his pro se status the subject of a motion or asserted as an issue for review at any stage in earlier proceedings. Even now the petitioner does not reveal the reason why the substitution occurred. While it is preferable for a litigant to retain experienced counsel at all times, there is no requirement to do so; there are no rules in the District Court for Minnesota or the Eighth Circuit Court of Appeals that the Court's permission is needed for the substitution in this jurisdiction, nor does the petitioner cite any applicable cases to the contrary. Thus, his reference to *Rule DR 2-110(A) of the Code of Professional Responsibility* is not applicable. In fact, *Rule DR2-110(C)(5)* clearly states a lawyer may with-

draw when . . . "His client knowingly and freely assents to termination of his employment."

While Mr. Smith has stated his self-representation as reason for his omissions and positions taken in earlier proceedings, there is no evidence that he previously requested or was prevented by education or financial position from obtaining relief from that condition. Also, the petitioner did, in fact, retain licensed counsel during the actual trial. In that he knowingly consented to act pro se long before trial, and made no claims with the Court to change that condition, it was not error for the District Court to permit him to act in that capacity. Moreover, the petitioner did not raise this circumstance as an issue for reversal in his appeal to the Court of Appeals. Where an issue is neither raised, nor considered by the Court below, this Court should not consider it. *Lawn v. United States,* 355 U.S. 339, 362 n.16 (1958), reh. den. 355 U.S. 967 (1958); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 147 n.2. (1970); *Brown v. United States,* 411 U.S. 223, 230 n.4 (1973); *Duigan v. U.S.,* 274 U.S. 195, 200 (1927).

2. The District Court did not commit error for remarks made in the presence of the jury. The petitioner's own actions at trial and his conduct as a witness gave reason for the remarks and, in context, did not deny him a fair trial.

The petitioner seeks reversal of the jury verdict on his Section 1981 claims on the grounds it was "prejudiced" by the trial judge's (a) rulings on objections raised by respondent's attorney, (b) instructions that the petitioner be responsive while being cross-examined, and (c) threatening the petitioner with contempt. However, the petitioner does

not show the respondents attorney's objections or questions were legally improper, or that the judge's directives to be responsive were wrong as a matter of law. Moreover, the judge's reference to possible contempt came only after the petitioner's continued failure to be responsive; obviously, it was made in an attempt to control the trial. Although the petitioner raised this contention as an issue for review to the Court of appeals, that Court found (after review of the trial record) that, in context, the judge's remarks did not deny Smith a fair trial or constitute reversible error. (App. 7a-8a.) No authority is here cited by the petitioner why this Court should rule otherwise.

3. The District Court did not commit error in its instructions to the jury. They substantially and fairly presented the issue of race discrimination to the jury, and a party is not entitled to a particular language of its choice. Also, the petitioner did not timely object before the instructions were given.

The petitioner also argues for reversal of the jury verdict on his Section 1981 claims, on the ground that the jury instructions were incomplete. However, the law is clear that the form and extent of instructions are within the discretion of the Court, so long as they sufficiently cover the case so a jury can intelligently determine the questions presented, and it correctly states the principle of law. A party is not entitled to have a jury instructed in the particular language of its choice. The charge is to be read as a whole for fairness to both parties and to determine that the substance of the case is adequately covered. If so, a judgment will not be disturbed because further amplification is refused. *U.S. v. Baver*, 331 U.S. 532 (1947); *Leathers v. U.S., 471 F.2d 856 (8th Cir. 1972), cert. den.*

412 U.S. 932; *Baker v. Preferred Mutual Ins. Co.*. 569 F.2d 1347 (5th Cir. 1978); *Simpson v. Norwesco Inc.*, 583 F.2d 1007 (8th Cir. 1978); *Stineman v. Fontbonne College*. 664 F.2d 1082, 1087 (8th Cir. 1981). In reviewing the petitioner's argument, the Court of Appeals found "...Most of Smith's contentions were presented to the jury, and *the instructions taken as a whole were adequate* to submit the substance of Smith's unlawful discrimination claim to the jury." (emphasis added) (App. 6a.)

Also, *Rule 51 of the Federal Rules of Civil Procedure* requires that any objection to instructions be made before the jury retires. Mr. Smith *and his co-counsel* were given opportunity to do so; they in fact accepted the Court's jury instruction, except one relating to the burden of proof. (App. 48a.) Thus, the Court of Appeals correctly found the petitioner waived this basis of appeal, and it should not be accepted. (App. 6a, 7a.) *Missouri Pacific R.R. Co. v. Star City Gravel Co.*, 592 F.2d 455, 459 (8th Cir. 1979).

4. The District Court's Findings of Fact is not erroneous as a matter of law.

First, it is clear that the Trial judge used the correct legal standard for determining the burden of persuasion required of the respective parties in a Title VII case (App. 12a, 13a.) The petitioner argues, however, that the Court's evaluation of the trial evidence was misplaced, when it ruled that:

> "...Plaintiff has failed to persuade this Court, in any of the instances of alleged disparate treatment, that he was treated any differently than any other employee would have been treated in the same or similar circumstances. Proof of this discriminatory motive was crucial to plaintiff's case. *International Brotherhood*

of Teamsters v. United States, 431 U.S. 324 (1977); *Johnson v. Bunny Bread Company,* 646 F.2d 1250 (8th Cir. 1981) ....He has failed to do so." (App. 25a, 26a.)

It is clear from the Trial Court's original findings, and its review of the petitioner's Motion for Amended Findings of Fact (App. 36a-41a), that the Court did not err in evaluating the facts established at trial by *both* parties. The petitioner's argument to this Court does not show otherwise, because (as the Trial Court found) "...[it] omits mention of most of the evidence pertaining to the incident or event which is not favorable to [the petitioner's] contention." (App. 37a.)

Moreover, on review, a finding of fact is not reversible unless it is clearly erroneous, nor is it necessary for the judge to make specific findings on all the facts or refer to every item of evidence. *FRCP, Rule 52; Pullman-Standard v. Swint,* 456 U.S. 273 (1982); *Craik v. Minnesota State Univ. Bd.,* No. 82-1930, slip op. (8th Cir. March 23, 1984). The Court of Appeals agreed that "...a review of the [record] indicates that the evidence supports the ... findings...the Trial Court did not err..." (App. 5a.) The petitioner's request for yet another review of the facts by this Court does not present a "special or important" issue to the Court, and it should not be accepted.

5. The Trial Court's jury instruction on standards of proof required of the petitioner to prove his Section 1981 claims was correct as a matter of law.

It is now clearly settled that a litigant asserting a violation of Section 1981 of the Civil Rights Act of 1866 must prove the defendant guilty of intentional discrimination—it is not enough to merely show disparate treatment.

General Building Contractors Assn. v. Pennsylvania, 458 U.S. 375 (1982). Even so, Mr. Smith attempts to argue that the Court's use of the term "purposeful discrimination" therein is confusing and Certiorari should be granted to clarify its meaning. It is submitted only the petitioner is confused. This Court was clear when it stated the question is "...whether liability under 42 U.S.C. §1981 requires discriminatory intent..." *Gen'l Bldg. Cont. Ass'n,* supra, at page 378. It answered in the affirmative.

The Trial Court's jury instruction was in accord with this standard. (The full instructions given, and the Trial Court's review of this contention when Smith moved for judgment n.o.v., is set forth in the Appendix at pp. 29a-32a.) While it is agreed that intent involves a state of mind, the Court also correctly instructed the jury that the requisite intent may be inferred from the defendant's statements, acts, or omissions. The jury reached no such inference; the instructions it received were legally correct and its verdict, based on the facts it heard, should not be disturbed.

Clearly, the petitioner places great emphasis on his contention that he should *not* be required to show the respondents intended (i.e., had a purpose or motive), at least in part, to act as they did *because* Mr. Smith is black. The reason is obvious; it would be easier for him to prevail under a lesser standard of proof. However, the issue here is whether the Trial Court's jury instruction was a correct statement of the settled law. This Court exhaustively examined the question in *General Bldg. Contractors Assn.,* supra, and has clearly held a showing of differential treatment alone is not enough; there must also be proof that the respondents decided to act as they did *because* Mr. Smith is black. The Court's jury instruction asked no more and no less. Mr. Smith's petition presents no basis for finding the Court erred in doing so, or that it should be reversed as a matter of law.

CONCLUSION

Having had a full opportunity to show that his employment was affected by impermissable bias—and failing to show that the instructions, conduct, or findings of the Trial Court were wrong as a matter of law—petitioner should not be granted a Writ simply because he disagrees with the conclusions of the Courts below. Petitioner consented to act pro se in this litigation prior to trial and employed counsel to assist him at trial, and has not earlier asserted that as ground for reversal. There is no substantial issue of law here presented for review. Thus, his petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals should be denied.

Respectfully submitted,

James A. Kaehler
Attorney for Respondents

APPENDIX

NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

United States District Court for the District of Minnesota

File Number Civ. N. 3-81-343

Alvin W. Smith,

Plaintiff,

vs.

Honeywell, Inc. a Delaware Corporation and Honeywell Information Systems, Inc. a Delaware Corporation,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Alvin W. Smith, Plaintiff above named, hereby appeals to the United States Court of Appeals for the 8th Circuit from the order denying Plaintiff's motions for:

1. Motion for Judgment Notwithstanding the Verdict (Rule 50(b)) or for a New Trial (Rule 59) under 42 U.S.C. § 1981 tried to the jury.
2. Motion for Amending the Findings of the Court (Rule 52(b)) or a New Trial (Rule 59) on Title VII, 42 U.S.C. § 2000 e. et. seq. tried to the bench.

entered in this action on the 5th day of May, 1983.

Dated: May 25, 1983.

By /s/ Alvin W. Smith
Plaintiff
Attorney Pro Se
8143 14th Avenue South
Bloomington, Minnesota 55420
612-482-3085

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1744

Alvin W. Smith,

Appellant,

v.

Honeywell, Inc.,

Appellee.

On Appeal from the United States District Court for the District of Minnesota.

Submitted: May 15, 1984
Filed: June 4, 1984

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and ARNOLD, Circuit Judge.

PER CURIAM.

Alvin Smith brought this employment discrimination action under both Title VII of the Civil Rights Act of 1964, and 42 U.S.C. §1981. He alleges that Honeywell, Inc., and its subsidiary, Honeywell Information Systems Inc. (Honeywell), discriminated against him because of his race in his initial hiring, in various actions taken during the course of his employment, and in the decision to discharge him. After trial before a United States Magistrate,[1] the jury re-

[1]The parties consented to try the case before the Hon. Patrick J. McNulty, United States Magistrate for the District of Minnesota, pursuant to 28 U.S.C. §636(c)(1). Because Smith asserted the same facts in support of both claims, the parties agreed to try the case to the court and the jury simultaneously.

turned a verdict in favor of Honeywell on the §1981 claims, and the magistrate ordered judgment for Honeywell on the Title VII claims. Thereafter, Smith[2] filed a Motion for Amended Findings of Fact or a New Trial on his Title VII cause of action, and a Motion for Judgment N.O.V. or a New Trial on his §1981 cause of action. The magistrate denied the motions and Smith appeals.

TITLE VII CLAIMS

Smith first contends that the trial court erred in denying him a new trial on his Title VII claims because the magistrate erroneously required him to show that Honeywell *intentionally* discriminated against him because of his race. Smith argues that a showing of intent is not required, and that to prevail he need only show that he was treated differently than other employees. This contention is without merit. A plaintiff alleging disparate treatment in a Title VII case has the burden of persuading the court that he is the victim of intentional discrimination. See, *e.g., Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981); *Craik v. Minnesota State University Board,* No. 82-1930, slip op. at 4 (8th Cir. March 23, 1984). The trial court did not incorrectly state the applicable law, nor did it abuse its discretion in denying the motion for a new trial on the Title VII claims.

Smith next contends that the trial court erred in denying his motion for amended findings of fact because the magistrate's factual determinations on his Title VII claims were not consistent with the evidence presented at trial and ignored relevant portions of his complaint. During Smith's eight-day trial, evidence was presented addressing num-

[2]Smith, a law school graduate, acted *pro se* at trial (though an attorney was present to assist him at various stages of the trial), and is proceeding *pro se* on appeal.

erous allegations of discriminatory treatment.[3] "[A] trial judge need not make specific findings on all facts nor refer to every item of evidence introduced in a lengthy trial. ..." *Craik v. Minnesota State University Board, supra,* slip op. at 10. In the present case, it appears that the magistrate adequately considered the evidence presented at trial and the issues raised in the pleadings in arriving at his conclusions.

This Court may set aside factual findings about an employer's discriminatory intent only if the findings are clearly erroneous. *Pullman-Standard v. Swint,* 456 U.S. 273 (1982). A finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). No such mistake is apparent in the case at hand. A review of the file and records indicates that the evidence supports the magistrate's findings. The trial court did not err when it denied Smith's motion for amended findings of fact on his Title VII claims.

SECTION 1981 CLAIMS

Smith argues that the trial court erred in denying the motion for judgment n.o.v. on his §1981 claims because "sufficient evidence was presented at trial . . . to prove discrimination." The reviewing court "may set aside a jury verdict only when there is no evidence of substance upon which reasonable persons could differ." *Ybarra v. Burlington Northern, Inc.,* 689 F.2d 147, 150 (8th Cir.

[3]Smith's complaint contains roughly ten separate allegations of discrimnatory treatment by Honeywell, including claims that defendants provided him with undesirable office space; hired him for a job with one title and gave him a job with another; denied him travel necessary to do his job; subjected him to abusive language; and discriminated against him in promotional opportunities and other job benefits.

1982). The evidence must be viewed in the light most favorable to the jury's verdict, giving the prevailing party the benefit of all reasonable inferences which may be drawn from the evidence. See, *e.g., Harris v. Pirch,* 677 F.2d 681, 683 (8th Cir. 1982). Applying these principles, the evidence on the record was sufficient for the jury reasonably to conclude that Honeywell did not intentionally discriminate against Smith because of his race. Therefore, the trial court correctly denied the motion for judgment n.o.v

Smith next asserts that he should have been granted a new trial on his §1981 claims because the jury instructions did not address all the issues in his complaint. This allegation of error has not been properly preserved for appellate review. Smith did not request additional instructions about particular acts of discrimination, nor did he alert the trial court to the alleged omissions in a timely manner as required by Fed. R. Civ. P. 51. See, *e.g., Missouri Pacific R.R. Co. v. Star City Gravel Co.,* 592 F.2d 455, 459 (8th Cir. 1979). Moreover, any plain error exception to compliance with Rule 51 is "confined to the exceptional case where error has seriously affected the fairness, integrity or public reputation of judicial proceedings." *Rowe International, Inc. v. J-B Enterprises, Inc.,* 647 F.2d 830, 835 (8th Cir. 1981). No such error is demonstrated here. Most of Smith's contentions were presented to the jury, and the instructions taken as a whole were adequate to submit the substance of Smith's unlawful discrimination claim to the jury. He has therefore waived this objection on appeal.

Appellant also objects to the jury instructions on the ground that the definition of discrimination was misleading and confusing because the instructions "asked the jury

to look at the *intent* of the defendants rather than the *purposeful act* of the defendants." Smith seems to be drawing a distinction without a difference. Presumably, he is again raising the objection made at trial: that the instructions incorrectly imposed on the plaintiff the burden of proving by a preponderance of the evidence that defendants had a racially discriminatory purpose or motive, and that it was not sufficient for Smith simply to show that he was black and was treated differently. The Supreme Court has clearly stated that liability cannot be imposed under §1981 without proof of intentional (or "purposeful") discrimination. *General Building Contractors Ass'n, Inc. v. Pennsylvania,* 458 U.S. 375 (1982). Smith is not entitled to a new trial on his §1981 claims on this basis.

Smith further contends that he is entitled to a new trial because the special verdict form given to the jury did not accurately reflect all the issues in his complaint. The form directly asked the jury to determine whether the defendants had unlawfully discriminated against Smith. The instructions adequately informed the jury about what constituted "unlawful discrimination." The record reflects that Smith agreed to have the issues presented to the jury on a special verdict form, and did not raise a timely objection to any errors or omissions in that form. This issue has thus not been preserved for appellate review.

Finally, Smith charges that the disparaging actions of the magistrate prejudiced the presentation of his case to the jury. The record suggests that the magistrate was frustrated at times by appellant's actions at trial, particularly Smith's conduct as a witness. The magistrate sustained a number of objections to unresponsive answers by Smith, and at one point said: "You lawyers are all alike. You don't listen to the question. Listen to the question and then answer that question." (Tr. Vol. IV p. 77). Later the

magistrate ordered an unresponsive answer stricken, instructing Smith "to answer the question or face a contempt charge." (Tr. Vol. IV p. 189). In context, it appears that neither these nor other remarks and rulings by the magistrate were sufficient to deny Smith a fair trial or to constitute reversible error.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1744-MN

September Term, 1983

Alvin W. Smith,

Appellant,

vs.

Honeywell, Inc., etc., et al.,

Appellees.

Appeal from the United States District Court for the District of Minnesota

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

July 17, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Alvin W .Smith,

Plaintiff,

vs.

Honeywell, Inc., a Delaware Corporation and Honeywell Information Systems, Inc., a Delaware Corporation,

Defendants.

MEMORANDUM DECISION AND ORDER FOR JUDGMENT

Civ. No. 3-81-343

At Duluth, in said District, this 8th day of March, 1983.

The above-titled case came on for trial before the undersigned United States Magistrate pursuant to provisions of Title 28 U.S.C. §636(c) (1). This case presents two causes of action. One premised upon provisions of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, *Title 42 U.S.C. §2000e et. seq.*, and the other upon provisions of the Civil Rights Act of 1866, *Title 42 U.S.C. §1981.* Because the elements of proof in an action premised on Title VII differ slightly from those in an action premised on Section 1981, and because plaintiff was not entitled to a jury trial of the action premised on provisions of Title VII, it was determined that all evidence would be pre-

sented in one trial, after which a jury would render a verdict on the cause premised on Section 1981, and the court, on the same evidence, where applicable, would enter Findings of Fact, Conclusions of Law, and an Order for Judgment on the cause premised on Title VII.

I.

There are two defendants named in this action. The actions against both defendants were cognizable under the provisions of Title 42 U.S.C. §1981. However, during pretrial skirmishing, it was determined that plaintiff's claims against Honeywell Information Systems, Inc., which were premised upon provisions of Title VII, were time-barred. *Cf., Title 42 U.S.C. §2000e-5(e).* Honeywell Information Systems, Inc., was, therefore, dismissed from the Title VII suit. Evidence to support plaintiff's Section 1981 claims against Honeywell Information Systems, Inc., was, of course, received, but it is considered in the Title VII case only insofar as it may shed light on the true character of matters occurring within the limitation period while plaintiff was employed by Honeywell. *See, United Airlines v. Evans, 431 U.S. 553 (1977).*

The trial consumed eight trial days, and, upon stipulation and agreement, the §1981 action was submitted to a jury of eight persons upon a special verdict form. After deliberating in excess of six hours, the jury returned a 7/8ths verdict which found neither defendant guilty of acts of discrimination against plaintiff which are prohibited by provisions of Title 42 U.S.C. §1981.

Trial of this action became a little more unwieldy than is customary, because plaintiff participated in the major portion of the proceedings as his own attorney. He was assisted by experienced trial counsel only sporadically. This resulted in some rather strange modes of interrogation, and

the introduction of a good deal of evidence extraneous to the issues. The court's efforts to manage the procedure by direction and instruction to plaintiff were largely unavailing.

II.

At the conclusion of introduction of evidence in a Title VII case, the court must evaluate all of the evidence adduced by both parties, and enter Findings of Fact and Conclusions of Law in accordance with provisions of Rule 52, *Federal Rules of Civil Procedure*. The facts must be found and stated specially, but, on occasions, a narrative or memorandum decision seems best suited to accomplish the purpose of Findings of Fact with continuity and clarity. Because plaintiff's grievances do not flow from a single incident, but are related to a course of conduct and charges of racial discrimination permeating the entire length of the relationship between the parties, this mode has been adopted herein, and is deemed to comply with form requirements of the Federal Rules of Civil Procedure and Local Rules of the United States District Court, District of Minnesota.

It is now well established, that, in employment discrimination cases, an adaptation of the format employed in *McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)*, to the factual situation presented should be utilized in assessing the evidence. Plaintiff relies on a disparate treatment theory. A case presented on this theory divides into three phases. First, plaintiff must establish a prima facie case by presenting facts which are sufficient to sustain an inference that the action by the employer of which plaintiff complains was at least partially motivated by impermissible considerations. *Furnco Const. Co. v. Waters, 439 U.S. 567 (1978); Mosby v. Webster College, 563 F.2d 901 (8th Cir. 1977)*. To rebut this prima facie case, the

employer must then go forward with the evidence and articulate a legitimate, non-discriminatory reason for the action which plaintiff challenges. *Johnson v. Bunny Bread Company, 646 F.2d 1250 (8th Cir. 1981); Ligons v. Bechtel Power Corp., 625 F.2d 771 (8th Cir. 1980).* This obligation does not entail assumption of the burden of proving the absence of an illegal motive, but merely the burden of production of evidence from which a non-discriminatory motive can be inferred. *Kirby v. Colony Furniture Co.*, 613 F.2d 696 (8th Cir. 1980). If this is accomplished, the burden of going forward with the evidence, to establish that the proferred reasons are merely pretexual, shifts to plaintiff. *Person v. J. S. Alberici Const. Co., Inc., 640 F.2d 916 (8th Cir. 1981); McCosh v. City of Grand Forks,* 628 F.2d 1058 (8th Cir. 1980); *Garrett v. Mobil Oil Corp., 531 F.2d 892 (8th Cir. 1976).*

Two things should be noted. Some courts loosely speak of a shifting of the burden of proof. This is technically incorrect. The burden of persuasion always lies with the plaintiff. *Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).* Secondly, the utilization of this tripartite trellis to analyze the evidence should not affect the conduct of the proceedings. Shifting the burden of going forward with the evidence does not result in a trifurcation of the trial.

With these preliminaries in mind, we can turn to the facts as the court finds them.

III.

Alvin W. Smith, the plaintiff, is a 38 year old black male. He graduated from the University of Akron, Akron, Ohio, with a B.S. degree in mathematics in 1967. Shortly after graduation, he obtained employment as an engineer with Babcock and Wilcox Corporation. While an undergraduate he was a member of the R.O.T.C., and he en-

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tered into mandatory active duty in the army as a Second Lieutenant in August, 1967. He was honorably discharged as a Captain in October, 1970, and returned to employment with Babcock and Wilcox for about two years. During this time, he pursued post-graduate study at the University of Akron in applied mathematics. From late 1972 to April, 1973, he was employed by General Tire Co. He left this employment to accept a position as a program analyst with Control Data Corp. in Minneapolis. While pursuing this employment, he enrolled in the University of Minnesota and received a M.B.A. degree in 1976. While at Control Data, plaintiff received three intra-company transfers and three promotions. Each was accompanied by an increase in salary.

On June 22, 1977, plaintiff filed a discrimination complaint against Control Data. In this complaint he alleged that he had been unlawfully discriminated against in performance appraisals, salary increases, job assignments, opportunity for transfer, and in a comment which plaintiff characterized as evidence of racial bigotry. After this charge was filed, Control Data reviewed and evaluated position descriptions, and concluded that there was no substantial justification for the position plaintiff held being paid at a lower grade level than comparable positions. On July 22, 1977, after plaintiff had left Control Data, an agreement was reached which provided that plaintiff would be paid $2,7082.50, [sic] which represented the pay differential. It was further agreed, that the settlement was not an admission by Control Data of any violation of Title VII.

During the spring of 1977, plaintiff had mailed resumes to a number of companies seeking employment, because he felt that opportunities for advancement at Control Data were slow, and that his salary was not increasing at an acceptable pace. Plaintiff had entered service with Con-

trol Data at a $13,800.00 annual salary. Four years later his annual salary was $22,680.00.

In about June, 1977, plaintiff met with Ricardo Rietti who, at that time, was manager of Product Management Operation of Honeywell Information Systems, Inc., a subsidiary of Honeywell, Inc. This was a newly created organization whose function was to formulate long-range marketing plans for computers and computer related products. Rietti was assembling a staff, and contacted plaintiff after receiving his resume. At the initial interview, Rietti explained the structure of Honeywell Information Systems, Inc., the role of the Product Management Operation in that structure, and the nature of the work which it was anticipated plaintiff could assume.

On June 7, 1977, Rietti sent a letter to plaintiff offering him a job as Manager, Planning and Support in the Product Management Operation of Honeywell Information Systems, at an annual salary of $26,400.00. Plaintiff accepted this offer, gave notice to Control Data, and on July 7, 1977, left Control Data and reported to Honeywell Information Systems. At this time, he learned that the title he would assume would be Manager, Separately Priced Services. The title originally mentioned was already being used elsewhere in the Honeywell organization and was unavailable to the Product Management Operation. The new title was developed by senior management to reflect a description of the job content. This change of title did not affect the salary or duties of the position which plaintiff had accepted, but plaintiff immediately made an issue of this change of title, and attributed it to racial prejudice. At the outset, plaintiff was also assigned an office with which he was displeased. Although he was the junior member of the organization, and this was the only office available, plaintiff expressed entitlement to a larger

office, and attributed these unsatisfactory quarters to his race. Shortly thereafter, the space assigned to the Product Management Operation was enlarged, and the entire staff was relocated. Plaintiff, evidentally, was more satisfied with his office thereafter. However, within a few months, plaintiff began to show resentment towards Rietti whenever instructions were issued, or comments made on the manner in which plaintiff's job should be performed. On one occasion, plaintiff accused Rietti of bigotry. The lack of basis for this charge is evidenced by Rietti's reaction. Rietti, an Italian national, had to look to the dictionary for a definition of the word, and found the definition and the concept unfamiliar and foreign to his cultural background. Rietti testified that it became apparent to him that plaintiff discerned a racial challenge in everything which concerned him or the manner in which he was performing his job.

During this time, plaintiff began to explore for opportunities elsewhere in the Honeywell family. At a casual meeting in the company cafeteria, plaintiff expressed a desire for a promotional transfer to Mr. William Griffin, who, as Manager of Corporate Transportation and Documentation for Honeywell, Inc., had responsibility for transportation, export control and customs matters worldwide. Coincidentally, at this time, part of the operation which Griffin supervised was being moved from Boston to Minneapolis, and he was looking for someone to fill a position in the export control area. This casual meeting blossomed into an offer of the position of Manager, Import and Export Administration in the Corporate Transportation Department. Plaintiff accepted, and joined Honeywell, Inc. on May 1, 1978, at an annual salary of $29,340.00, the same salary he was then receiving at Honeywell Information Systems.

In the meantime plaintiff had enrolled in William Mitchell College of Law. He pursued his education in law throughout his employment at Honeywell, and received a J.D. degree in 1981. This education was paid for largely by a combination of benefits from the G.I. Bill and a direct subsidy by Honeywell.

In addition to plaintiff, Griffin's staff included a Manager of Transportation and Distribution, which position was held by Robert Maidman.

During the first few months of his employment, plaintiff was in a learning process and intra-office relationships were reasonably smooth. As time went on, however, Griffin received complaints from Honeywell employees in Minneapolis, Washington, Phoenix, Denver, and Colorado Springs that plaintiff was becoming quite disagreeable and discourteous. This attitudinal problem also manifested itself in plaintiff's relationship with Griffin, his immediate supervisor. Some of the events which precipitated a clash between plaintiff and Griffin seemed to be relatively minor in nature, but the confrontations which ensued were not. For clarity, the major incidents which plaintiff contends evidence racial discrimination, and which defendants contend ultimately led to plaintiff's termination for sound business reasons, will be discussed separately.

In January, 1979, plaintiff requested authority to travel to the Phoenix plant. Griffin denied permission for this trip. Plaintiff persisted in his request, in person and in writing. Upon Griffin's final refusal, and plaintiff's continued insistence, heated words were exchanged. Plaintiff alleges this incident as one of racial prejudice. At that time, travel by Honeywell employees was being curtailed for economic reasons. The responsibility for matters reposed in the Corporate Transportation Department was ultimately Griffin's, including whether or not travel was necessary

to the efficient administration of import-export matters. Neither Griffin's authority to make these decisions, nor whether or not his decisions were always right, is an issue. Only the motivation for the denial is of import. Regardless, the matter with which plaintiff was concerned was eventually solved by a telephone call, which indicates that the decision by Griffin was sound, and that the denial was based upon a business reason and not upon racial considerations. There is evidence in the case that travel requests by more senior members of management in Honeywell were also denied during this period. Plaintiff's effort to establish disparate treatment by a comparison of his authorized travel with that of Maidman is unavailing. The duties of their respective jobs, and the sphere of their respective responsibilities, differed, and the necessity of travel to the performance of their duties is not validly comparable.

During the same period of time, plaintiff had repeatedly parked his car in a parking ramp which was reserved for senior corporate officers, instead of in the lot to which he was assigned. In February, 1979, Griffin ordered plaintiff to remove his car from the ramp, and to park it in its assigned spot. Plaintiff replied that he would park on the street. Griffin told him to park it in the lot, and plaintiff replied to the effect that he would park where he pleased. Plaintiff admitted that on at least one occasion thereafter he defied Griffin and parked his car in the ramp. Honeywell policy was to report parking violations to the supervisor of the department in which the violator worked, and the supervisor had the responsibility for correcting the miscreant. Plaintiff failed to produce evidence that any other similarly situated lower echelon employee was granted more desirable parking privileges than those afforded him, or that any other unauthorized person presumed to park in the ramp with impunity. The importance of this incident, however, is not the minor infraction of company

rules for which plaintiff was corrected, but the belligerence with which plaintiff received a justifiable reprimand, and his blatant defiance of his superior's directions thereafter. Plaintiff's conduct, and not a strained inference of racial prejudice is what magnified this minor incident to major proportions.

In May, 1979, as the law school examination time neared, difficulty and unpleasantness between Smith and Griffin arose in regard to when and how much time plaintiff would take off to study for exams, and whether or not this time would be compensatory or would be vacation time. On several occasions plaintiff absented himself from the office without prior notification to Griffin. Plaintiff contends that he never asked for compensatory time off, and that, because he was black, Griffin only reluctantly granted permission to take vacation time for this purpose. Griffin testified that he had quite leniently permitted plaintiff to take both vacation and compensatory time to study, and that his only concerns with plaintiff utilizing his vacation time were with advance notice from plaintiff of his absence from duty, and with the likelihood that plaintiff would leave himself no time for a genuine vacation. This difference in recollection aside, it is established that plaintiff was afforded time to study for exams, and the record is devoid of any evidence that plaintiff was faced with any restrictions in this regard which were not universally imposed upon employees, regardless of color.

In August, 1979, plaintiff, with the intervention of another employee, set up a meeting with a senior vice president of Honeywell to discuss his career problems. This precipitated another confrontation when Griffin heard of this meeting and in no uncertain terms expressed his disapproval of plaintiff disregarding the normal chain of

command. Testimony regarding whether or not plaintiff lied to Griffin about how the meeting came to be is in conflict, but it is clear that Griffin believes that plaintiff fabricated a story. In any event, plaintiff's lack of discretion is apparent. Other employees testified that seeking counsel from senior executives was not forbidden, but that to do so without clearing it with the employee's supervisor, and with employee relations department personnel, is not acceptable procedure. Plaintiff contends that Griffin's reaction was because plaintiff is black. Again, however, we have an instance of plaintiff violating protocol and ignoring common courtesy and attributing the reverberation to his color, without any showing that a white employee exhibiting a similar lack of discretion would have been treated any differently.

During plaintiff's tenure at Honeywell, the office space assigned to a number of departments, including the Corporate Transportation Department, was remodeled. The office space, to which persons in plaintiff's echelon of management were assigned, was composed of cubicles with partitions approximately 5 ft. high. The one to which plaintiff was assigned was one which contained a supporting pillar. Plaintiff contends that he was given this less desirable space because of his color. James Remington, Griffin's supervisor, who assigned the space, testified that he grouped the assignments on the basis of organizational units, and that within the units offices were assigned more or less arbitrarily without consideration of whether or not they contained a pillar. All other offices containing a pillar were assigned to whites. The court fails to discern any pattern which indicates that Remington purposely assigned plaintiff an office with a pillar because of his race. It just happened.

A number of other events occurred which resulted in heated exchanges, interspersed with profanity, between

Griffin and plaintiff. These matters included plaintiff's claim of lack of recognition in departmental reports, the inconsistency of Griffin's work directions, plaintiff's complaint of a real or imagined exclusion from preparing performance evaluation for a secretary which he shared with Maidman, the untimely submission of travel expenses and tuition payment requests, and plaintiff sending unauthorized telex messages. All of these resulted in complaints by plaintiff that white employees were receiving better treatment than he was, and that he was being verbally abused. It is of interest to note that at no time was plaintiff subjected to racial slurs, or language which differed in any way from that directed at other employees, or that he was being required to comply with rules and regulations which other employees could ignore, or which were not specific directions from his supervisor based upon sound managerial discretion.

Plaintiff's dissatisfaction with working in Griffin's organization had become manifest by mid-1979. He made this, and a desire for a transfer, known to other members of the corporate staff, and they exerted sincere and reasonable efforts to find a position in the Honeywell organization to which plaintiff could transfer without demotion or decrease in pay. That these efforts did not succeed in locating a satisfactory position into which plaintiff would transfer can be attributed to a number of reasons, but not to a lack of cooperation with plaintiff or to a lack of effort to accommodate his wishes.

Throughout this period of time, plaintiff had a number of lengthy sessions with Myron Amundson, Director of Employee Relations, at which he aired his grievances and expressed his desires. During these conversations plaintiff was indiscreetly critical of Griffin, calling him a fool, crazy, and totally irrational. Griffin brought what he characterized as plaintiff's gross insubordination to

Amundson's attention. Amundson listened to both, and tried to advise and guide plaintiff without avail.

Plaintiff also had a series of conferences with James Remington, Director of Procurement, Griffin's immediate supervisor. Remington also attempted to advise and guide plaintiff and to mediate the apparent problems.

Griffin testified that, in January, 1980, he was informed by a senior Commerce Department official that plaintiff had complained of the treatment he was receiving from Honeywell and that he was contemplating a class action discrimination suit. Plaintiff denies ever making this statement. The Commerce Department official was not called as a witness, and we are faced with a creditability issue. In view of similar statements made by plaintiff to a number of other persons on a number of other occasions, the likelihood that he made this statement on this occasion is far greater than the likelihood that Griffin fabricated the story from whole cloth, and, whether or not plaintiff verbalized this threat to this official on this occasion, this Court is persuaded that Griffin believes that he did. Naturally, this could do little to cement a sound business relationship between supervisor and supervised.

In February, 1980, Griffin submitted a memo to Amundson informing him that plaintiff was dissatisfied with his prospects at Honeywell and was seeking employment elsewhere. Griffin asked that a 90 day limitation to plaintiff's employment be imposed. It was not, and efforts by Amundson and Remington to ameliorate the situation continued.

In April, 1980, Amundson, directed William Tyler, Corporate EEO Manager, to investigate and report to him on the situation in Griffin's organization. Tyler interviewed plaintiff, Griffin and Remington, separately, with a view to ascertaining facts and forming conclusions. Plaintiff, as instances of racial discrimination, raised most of the is-

sues which he had previously raised with Griffin, Remington and Amundson, which are discussed above. Tyler found that there were apparently sound business reasons for actions which Griffin had taken, that communication between Griffin and plaintiff was poor, that there was no evidence of disparate treatment, and concluded that the charges of racial discrimination were without merit. Tyler observed that plaintiff's career expectations were unrealistic, that plaintiff was becoming frustrated at being unable to reach these objectives, and that he had threatened to use his race as leverage. Tyler concluded that it would be best for all concerned if plaintiff were to leave Honeywell. After preparing this report, Tyler met with plaintiff to discuss his findings. This meeting was rather abruptly terminated by plaintiff when he discovered that findings would not be in his favor.

Thereafter, during the month of July, several meetings between plaintiff, Griffin and Remington were held. None of the problems were resolved to plaintiff's satisfaction, and at the conclusion of one of these meetings, plaintiff stood in the doorway of Maidman's office and declared, "I am going to teach them not to (expletive deleted) around with a third year law student." This prompted Maidman to seek an audience with Remington at which he asked that the matter be settled as soon as possible because the whole office was being disrupted.

On July 26, 1980, Griffin submitted a memo to Remington in which he stated that plaintiff's unwillingness to accept comments or criticism, and his general attitude, were wholly unsatisfactory, and requested that plaintiff be removed from his position immediately.

This precipitated a meeting between plaintiff, Griffin and Remington on July 28, 1980. At this meeting, plaintiff was informed that because of his unwillingness to follow directions, and the continuing conflict which resulted, and

because of the deterioration in his job performance, and because of the discord which had disrupted the entire office, he was being placed on probationary status to determine whether or not he could change his attitude in the business environment and dedicate his ability and attention to performing his job. Plaintiff immediately demanded a transfer. Remington explained that this was impossible, because of his record and the general employment conditions within Honeywell. Plaintiff then demanded that he be furnished with precise written day-to-day ground rules and instructions. Remington informed him that this was impossible, that professionals could not be managed in this fashion. Plaintiff was then asked that, if given the past 18 months to live over, would he have done anything differently? Plaintiff refused to answer, and left the meeting. Plaintiff's supervisors concluded that plaintiff felt no compelling need to change his attitude, would not accept instruction and direction in the future, and determined to terminate his employment with Honeywell.

Plaintiff entered the employ of Honeywell Information Systems, Inc., at a $26,400.00 yearly salary, and joined Honeywell, Inc., at a yearly salary of $29,340.00 He received three increases in pay while at Honeywell, and when he was terminated was receiving $36,540.00 per annum. There is nothing in this wage escalation which indicates that race played any part in the remuneration which he received.

IV.

To place all of the evidence in this case in perspective, one must recognize the personal characteristics of the main actors. Griffin was educated at the United States Naval Academy and retains many mannerisms of a professional naval officer. He is brusque, obviously expects almost un-

questioned obedience to orders, and is probably prone to the use of profanity, which, lamentably, is not unusual in persons in high office. Plaintiff is young, almost overly ambitious, independent, very race conscious, and not adverse to exploiting his race to his advantage. When we view the evidence as a whole, we are lead ineluctably to the conclusion that the mass of the conflict distills into Griffin's impression that plaintiff would not follow directions and was defiant and insubordinate, on the one side; and plaintiff's frustration in what he perceived to be a dead end position, and his resentment of Griffin's supervision, on the other. Plaintiff established a prima facie case by showing that he is of a minority race, that he was terminated, and that a white person was hired to fill the position. Defendant rebutted this prima facie case by articulating a sound, non-discriminatory business basis for every one of the actions of which plaintiff complains. Plaintiff has failed to produce evidence which weakens or rebuts defendants' position. It would seem fundamental to a disparate treatment theory, that plaintiff prove that the treatment which he plaintiff is different in character and degree from that received by white employees. Plaintiff has failed to persuade this Court, in any of the instances of alleged disparate treatment, that he was treated any differently than any other employee would have been treated in the same or similar circumstances. Proof of this discriminatory motive was crucial to plaintiff's case. *International Brotherhood of Teamsters v. United States,* 431 *U.S. 324 (1977); Johnson v. Bunny Bread Company, 646 F.2d 1250 (8th Cir. 1981).* Plaintiff assumed the burden of establishing his claim by a preponderance of the evidence. *Kirby v. Colony Furniture Co., 613 F.2d 696 (8th Cir. 1980).* Proving that an articulated justification for an employer's action is pretext is no more than exposing a

discriminatory motive. To prove pretext, plaintiff had the burden of showing a similarity between his conduct and that of white employees, and a disparity or difference in treatment of such conduct when committed by white employees and that which he received. *Kendrick v. Commission of Zoological Subdistrict, 565 F.2d 524 (8th Cir. 1977)*. He has failed to do so. Instead, the evidence is overwhelming that plaintiff was treated no differently than any other employee by Honeywell, and that his discharge was for insubordination. Insubordination is a legitimate ground upon which to base a discharge. *Guy v. Swift & Co., 612 F.2d 383 (8th Cir. 1980)*.

WHEREFORE, It is:

ORDERED:

That judgment be entered for defendants.

BY THE COURT:

/s/ Patrick J. McNulty
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
DISRICT OF MINNESOTA
THIRD DIVISION

Alvin W. Smith,

Plair.tiff,

vs.

Honeywell, Inc., a Delaware Corporation and Honeywell Information Systems, Inc., a Delaware Corporation,

Defendants.

ORDER
Civ. No. 3-81-343

At Duluth, in said District, this 4th day of May, 1983.

The above-titled case came on for hearing before the undersigned United States Magistrate, in accordance with provisions of Title 28 U.S.C. §636(c) (1), upon post-trial motions by plaintiff. Plaintiff appears pro se and defendants appear by James A. Kaehler, Esq.

I.

The case was tried in an extraordinary fashion. It presents two causes of action. One premised upon provisions of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. *Title 42 U.S.C. §2000e et. seq.*, and the other upon provisions of the Civil Rights Act of 1866, *Title 42 U.S.C. §1981*. Because the elements of proof in an action premised on Title VII differ slightly from those in an action premised on Section 1981, because Honeywell Information Systems, Inc. was not subject to Title VII liability, and because plaintiff

was not entitled to a jury trial of the action premised on provisions of Title VII. it was determined that all evidence would be presented in one trial; after which a jury would render a verdict on the cause premised on Section 1981, and the court, on the same evidence, where applicable, would enter Findings of Fact, Conclusions of Law, and an Order for Judgment on the cause premised on Title VII.

The trial consumed eight trial days, and, upon stipulation and agreement, the §1981 action was submitted to a jury of eight persons upon a special verdict form. After deliberating in excess of six hours, the jury returned a 7/8th verdict which found neither defendant guilty of acts of discrimination against plaintiff which are prohibited by provisions of Title 42 U.S.C. §1981.

On March 8, 1983, the court entered Findings of Fact and Conclusions of Law adverse to plaintiff's Title VII claims, and ordered judgment for Honeywell, Inc.

Plaintiff's motions are for a judgment notwithstanding the verdict or for a new trial in the Section 1981 action tried to the jury, and for Amended Findings of Fact or for a new trial on the Title VII cause of action tried to the bench.

II.

The motion for judgment n.o.v. can be, quite properly, joined with a motion for a new trial, *Rule 50(b), Federal Rules of Civil Procedure*, and a motion for amended findings can be, quite properly, joined with a motion for a new trial. *Rule 52(b), Federal Rules of Civil Procedure*. However, the motions have distinct functions, and the standards which govern their determination accordingly differ. *See, Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940); Simpson v. Skelly Oil Company, 371 F.2d 563 (8th Cir.*

1967). The defendant does not claim that the Court's instructions to the jury, by inclusion or exclusion, constitute, in whole or in part, an error in fundamental law, and he does not claim that the court's conclusions of law contain error, in and of themselves, with one minor exception. Defendant's attack is directed primarily to the issue of whether or not factual findings by the court and jury are supported by the evidence. There was some allusion to an erroneous view of the law taken by the court in plaintiff's motion papers, to which the court will allude later. To remove any ambiguity from plaintiff's position, the court, at the conclusion of plaintiff's presentation, directly asked plaintiff whether or not he was seeking relief based upon a quarrel with the court's interpretation of controlling law. The plaintiff, without qualification, confirmed his intent to rely solely on error in factual findings.

III.

In the moving papers seeking judgment n.o.v., plaintiff has taken the position that to sustain his causes of action it was not necessary that he prove a discriminatory motive, or an intent to discriminate, by a defendant. The court is not comfortable resting on the assumption that plaintiff will adhere to the abandonment of this contention made during argument on these motions. It will, therefore, be briefly discussed. As nearly as the court can now reconstruct, without recourse to a transcript, in the charge to the jury the court read Section 1981, and then instructed that:

> "...the Civil Rights Act makes it unlawful for an employer to differentiate in conditions of employment or to discharge or terminate the employment of any person for the reason of that person's race.

Not every difference in conditions of employment or every discharge or termination of a black person is unlawful under the Act. The mere fact that plaintiff is black and was also treated differently or is discharged is not sufficient in and of itself to establish plaintiff's claim or to show a violation of the Act.

In order for plaintiff to establish his claim, plaintiff has the burden of proving by a preponderance of the evidence that defendant had a racially discriminatory purpose or motive in differentiating in conditions or terminating plaintiff's employment.

If you find that the differentiation or the discharge of the plaintiff by defendant was not for the reason of his race, then there would be no violation of the Civil Rights Act, and the differentiation or the discharge would be lawful.

* * *

The plaintiff's claim against the defendant in this case has three essential elements, as follows:

FIRST: That the defendant intentionally discriminated against the plaintiff in connection with his employment, or with respect to the termination of employment;

SECOND: That the effective reason for such intentional discrimination was the race of the plaintiff; and

THIRD: That as a direct result of such intentional discrimination the plaintiff sustained damages.

Plaintiff has the burden of proving each of these essential elements by a preponderance of the evidence.

* * *

> Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances proven which indicate his state of mind."

This is also the approach which this Court adopted in the Title VII case, on what was felt to be determinative authority. *Cf., Washington v. Davis, 426 U.S. 299 (1976); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981).* More recently, in *General Building Contractors Ass'n. v. Pennsylvania, —— U.S. ——, 102 S.Ct. 3141, 73 L.Ed. 835, 29 F.E.P. 139 (1982),* the Court addressed the issue exhaustively, and concluded that:

> "...§1981, like the Equal Protection Clause, can be violated only by purposeful discrimination."

In a recent Title VII case, the Court stated the proposition thusly:

> "The 'factual inquiry' in a Title VII case is 'whether the defendant intentionally discriminated against the plaintiff.' *Burdine supra, at 253.* In other words, is 'the employer ... treating some people less favorably than others because of their race, color, religion, sex, or national origin.' "

United States Postal Service Board of Governors v. Aikens, No. 81-1044, slip. op. (United States Supreme Court, April 4, 1983).

Plaintiff contends that "the jury instruction for determination of liability required a showing of *intentional* discrimination because of race rather than a showing of discriminatory impact." This Court agrees, but is convinced that this is the law, and concludes that the fault which plaintiff finds with the precept rests upon a misapplication of what the courts have stated is necessary to establish a prima facie case under the first leg of the *Burdine* procedure, or upon a confusion of the facts of this case with those concerned with employer policy or practices which are facially neutral, but discriminatory in effect.

One can almost always find through hindsight that a proposition could have been stated more clearly or precisely. That may be true in this case, but this Court is not persuaded that this case was submitted to the jury under instructions which in their totality imposed a greater burden of proof upon plaintiff than the law dictates, and is certain that the law as articulated by the Supreme Court was applied in the determination of the Title VII case. The burden of proof which plaintiff assumed was to establish by the greater weight of the evidence that a racially discriminatory motive played a part, or contributed, to the conditions of employment of which he complains or to his discharge.

We can turn then to the avowed basis for plaintiff's claims for relief presented by these motions.

IV.

JUDGMENT NOTWITHSTANDING THE VERDICT

In determining a motion for judgment n.o.v., a court is not free to exercise judicial discretion. The only question for determination by the court is whether or not there was sufficient evidence to raise a fact issue to submit to the jury, without any assessment of the credibility of witnesses and without regard to the weight of the evidence. Whether

or not the evidence was sufficient to create an issue of fact justifying the submission of the case to the jury is a question of law, *Clarke v. Chicago & N.W. Ry. Co., 63 F. Supp. 579 (Minn. 1945)*, and is determined by the same standards utilized in determining a motion for directed verdict. *Dulin v. Circle F Industries, Inc., 558 F.2d 456 (8th Cir. 1977)*. The motion, if granted, results in depriving the opposing party of a trial by jury and must be granted at caution. *Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970); General Corporation v. General Motors Corporation, 184 F. Supp. 231 (Minn. 1960)*. The Court's inquiry, therefore, regardless of the various ways in which it has been stated, is directed to determining whether or not the evidence, viewed in the light most favorable to the prevailing party, is such that reasonable men could have reached nothing other than a conclusion which is contrary to that of the jury. *Cf., Giordano v. Lee, 434 F.2d 1227 (8th Cir. 1970), cert. den. 403 U.S. 931 (1971); Banks v. Koehring Co., 538 F.2d 176 (8th Cir. 1976); E. H. Boerth Co. v. LAD Properties, 82 F.R.D. 635 (Minn. 1979); Quast v. United States, 293 F. Supp. 56 (Minn. 1968); LaPlante v. Radisson Hotel Company, 292 F. Supp. 705 (Minn. 1968); Zoll v. Eastern Allamakee Community School District, 588 F.2d 246 (8th Cir. 1978); Giordano v. Lee, 434 F.2d 1227 (8th Cir. 1970)*. The standards which this trial court must utilize in making this evaluation are now well established, i.e.:

1. The court must consider the evidence in the light most favorable to defendants.

2. The court must assume that all conflicts in the evidence were resolved by the jury in favor of the defendants;

3. The court must assume as proven all facts which the defendants' evidence tends to prove;

4. The court must give the defendants the benefit of all favorable inferences which may reasonably be drawn from the facts proven; and

5. The court must deny the motion if, reviewing the evidence in this light, reasonable men could differ as to conclusions to be drawn from the evidence.

Hanson v. Ford Motor Company, 278 F.2d 586, 596 (8th Cir. 1960) (Blackman, J.).

In other words, the plaintiff is not entitled to judgment n.o.v. unless reasonable minds, viewing the evidence in the light most favorable to defendants, could only have found in favor of plaintiff. *Russ v. Ratliff, 538 F.2d 799 (8th Cir. 1976).*

Plaintiff's case was constructed upon a series of events and incidents during the course of his employment and ultimate discharge which he contends were racially motivated discrimination. Defendants countered by evidence tending to establish that the events, incidents and discharge were not discriminatory, in the pure sense, were not racially motivated, in any sense, and were products of legitimate, non-discriminatory business reasons. Fact issues were clearly raised by competent evidence, and this Court is not prepared to rule that, when the assumptions and benefits of the jury verdict are considered, reasonable men could not differ on their resolution.

Plaintiff's motion for judgment n.o.v. must be denied.

V.

NEW TRIAL

Unlike a motion for judgment notwithstanding the verdict, a motion for a new trial is addressed to the sound discretion of the trial court. This exercise of judicial discretion, however, is not a license to freely invoke judicial

whim. An exercise of discretion is a judicial act which is controlled by more or less well-defined standards. *See, B. Cardozo, The Nature of the Judicial Process, (1921)* In exercising the wide latitude reposed, the court is free to evaluate the credibility of witnesses and the weight of the evidence, but it must remain cognizant of the fundamental principle that a court must refrain from anything more than a minimal interference with the fact finding function of a jury. *Cf., Cooper, Directions for Directed Verdicts· A Compass for Federal Courts, 55 Minn. Law. Rev. 903 (1971).* Verdicts can, and should, be set aside, and a new trial granted, only when the verdict is contrary to the clear weight of the evidence to the extent that it constitutes a clear miscarriage of justice. *Simpson v. Skelly Oil Company, 371 F.2d 563 (8th Cir. 1967); Garrison v. United States, 62 F.2d 41 (4th Cir. 1932); Reid v. Maryland Casualty Co., 63 F.2d 10 (5th Cir. 1933).* In making this determination, the trial court is not required to view the evidence in the light most favorable to the prevailing party, *Simpson v. Skelly Oil Co., supra,* and may consider and weigh all factors which are pertinent. *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc., 466 F.2d 179 (8th Cir. 1972), cert. den. 410 U.S. 930 (1973).* A court must stop short of granting a new trial, however, merely because the jury could have drawn different inferences or conclusions from the evidence, or because another result may appear to the court to be more reasonable. *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc., supra.* It must be reasonably clear that prejudicial error was committed at trial, or that substantial justice has not been achieved. *See, 11 Wright & Miller, Federal Practice and Procedure §2803, p. 32 (1973).*

The court has reviewed the testimony as reflected in its notes and all exhibits. The ultimate issue in this case was

discrimination *vel non*. The jury was clearly instructed that all that plaintiff had to do was to show that from the evidence that it was more likely than not that illegal discrimination had occurred. The jury's finding was, essentially, to the contrary. This evidence was not contraindicated [sic] by the weight of the evidence to the extent that it even approaches characterization as a clear miscarriage of justice.

Plaintiff's motion for a new trial on his §1981 action must be denied.

VI.

MOTION FOR AMENDED FINDINGS OF FACT

A challenge to a court's findings of fact following a bench trial can be either, (1) that the findings do not inadequately provide a clear understanding of the process by which the court reached its ultimate conclusion, or (2) that the findings are erroneous. *Curtis v. C.I.R., 623 F.2d 1047 (5th Cir. 1980)*. In this case, plaintiff's attack is based solely on the latter alternative. Plaintiff has demonstrated in brief and argument that he fully understands the court's reasoning process. Amplification of the findings is not necessary.

This Court finds no specific direction to the trial courts delineating duties or setting standards governing consideration of a motion for amended findings of fact. One must assume, therefore, that the court must reconsider the factual findings in the light of the objections to them. This entails a review of the evidence, and a determination of whether or not the conclusions which the court originally drew from conflicting factual inferences in the evidence are supported by the weight of the evidence. This is something more than merely resting on an initial determination, and short of permitting relitigation of the case on its merits.

a.

One must also recognize that findings of fact can be influenced by the court's interpretation of the controlling substantive law. *Cf., United States Postal Service v. Aikens, supra.* To clearly present this hurdle to an appellate tribunal, therefore, this Court will state in simple terms the factual elements of the cause of action which this Court felt that plaintiff had to prove to establish liability of a defendant in the Title VII case in somewhat the same way that it reposed in the recesses of this Court's mind when this case was under consideration, the evidence was being reviewed, and the decision drafted. To prevail, plaintiff had the burden of proving by the preponderance, or greater weight, of all of the evidence:

a. that he was discriminated against, i.e., that he was treated differently than other employees occupying similar positions in the corporate structure;

b. that this discrimination was illegal, i.e., that it was purposeful or intentional, and was motivated, at least in part, because of his race.

b.

With that in mind, we can turn to, and attempt to identify, the specific fault which plaintiff finds with the court's findings of fact. Plaintiff's approach was to reiterate each of the events or incidents upon which he presented evidence, and then relate the inferences and conclusions which he draws therefrom. In doing so, however, he omits mention of most of the evidence pertaining to the incident or event which is not favorable to his contention, mistates evidence frequently, and oversteps the bounds of the record on a number of occasions. The court will not attempt to track plaintiff's approach and specifically address each

of the points which he attempts to make. Two will be commented upon for illustrative purposes.

Plaintiff starts with his initial employment by Honeywell Information Systems, and his complaints relating to the change in job title and the lack of a definitive written job description. Although Honeywell Information Systems was not a defendant in the Title VII case, and this evidence was considered only insofar as it could shed light upon events which transpired while he was employed by Honeywell, Inc., plaintiff's treatment of the issue demonstrates his approach. The court, in its findings of fact, stated:

> "This change of title did not affect the salary or duties of the position which plaintiff had accepted, but plaintiff immediately made an issue of this change of title and attributed it to racial prejudice."

Plaintiff does not quarrel with these facts, but, from the evidence as he views it, concludes that:

> "There was evidence that Plaintiff was the only minority in this part of the Corporation. Plaintiff was hired in a fraudulently discriminatory manner for reasons which led one to wonder if plaintiff was hired to meet an EEOC goal and not for the job for which plaintiff was hired."

Plaintiff urges the court to adopt this conclusion and inference. A careful review of the court's notes covering all of the testimony relating to plaintiff's hiring and employment by Honeywell Information Systems confirms the court's original finding that the position for which plaintiff was hired was not misrepresented, that a different job title was created for a rational business reason, that there is no evidence relating to EEOC goals, if such existed, and that the inference plaintiff urges upon the court is sheer speculation.

Plaintiff also dwells upon the acrimony which developed from his unauthorized use of a parking ramp, stating that:

> "COMPLIANCE WITH RULES AND REGULATIONS. There is evidence of only one time that the Plaintiff did not comply with the Company rules and regulations. That was the situation which Mr. Griffin identified as a 'significant event' when the Plaintiff parked his car without permission in the 'parking ramp'. There is evidence that the parking ramp is used by all levels of employees and the assignment is on senority [sic] bases [sic]. The plaintiff parked his car in the ramp without authorization on three occasions to avoid rain. [sic] Mr. Griffin told Plaintiff in a shouting publicly abusive manner to move his car. The Plaintiff testified that he saw other employees parking there in an unauthorized manner. After Mr. Griffin finished shouting at the Plaintiff in Public, [sic] Plaintiff immediately moved his car reported the abusive treatment to the proper authorities. The Plaintiff testified that he never parked his car again in the parking ramp until he received authorization from the corporate authorities."

Plaintiff conveniently makes no reference to his own testimony which established that this seemingly minor incident was blown out of proportion by his conduct after receiving a justifiable direction. Plaintiff forgets that he told his supervisor that he would park his car anywhere he "damned pleased".

The court's finding of fact in this regard was based almost entirely on plaintiff's own testimony. The court's impression is reflected in the findings as follows:

> "The importance of this incident, however, is not the minor infraction of company rules for which plaintiff

was corrected, but the belligerence with which plaintiff received a justifiable reprimand, and his blatant defiance of his superior's directions thereafter. Plaintiff's conduct, and not a strained inference of racial prejudice, is what magnified this minor incident to major proportions."

Plaintiff's comment in his attack on this portion of the court's findings is that:

> "There is no evidence that the parking ramp was used only by senior management nor is there is [sic] any evidence that Plaintiff after instructions from Mr. Griffin ever parked in the parking ramp until authorized by the Company."

Whether spaces on the ramp were assigned to senior management, as the court stated, or on basis of "seniority", as plaintiff contends, is of little import. Plaintiff admittedly was not afforded the privilege, and, contrary to his assertions, testified that on at least one occasion after this emotional eruption he again violated the company rule and parked his car on the ramp.

The conclusion which plaintiff draws from his version of the facts is that:

> "Plaintiff at all times followed the work direction of Mr. Griffin and even followed work direction which was inconsistant from previous work direction The actions and conduct of Mr. Griffin again evidenced an aggressive individual whose tactics were to treat Plaintiff in a disparate discriminstory [sic] manner. Again it should be noted, that all witnesses except for Mr. Griffin stated that the Plaintiff was courteous, friendly, and competent, whereas some witness

[sic] testified that they had difficulty working with Mr. Griffin. Indeed Mr. Griffin left Honeywell because he stated that he in essence had no future in Honeywell. Again it should be noted that Mr. Griffin sworn testimony on the witness stand conflicted with both documented evidence and parts of his deposition taken under oath."

The court is unable to determine the documented evidence to which plaintiff refers, and Griffin's deposition is not in evidence, but the deposition testimony to which plaintiff referred at trial was wholly consistent with Griffin's testimony at trial in regard to this incident. Regardless, the conclusion which plaintiff now urges upon the court is foreign to the finding of fact to which it is directed. It does, however, again demonstrate that plaintiff's problems while at Honeywell were rooted in his ill-concealed dislike for his immediate supervisor, not in racially motivated discriminatory acts.

The court has reviewed all of its notes and all of the documentary evidence introduced at this trial, and carefully considered each and every one of plaintiffs' arguments. None of them have merit. Hindsight indicates that the findings of fact could have been presented in better form, and the law more exhaustively treated. However, the court considers its relation of the findings of fact adequate, and finds that they are supported by the weight of the evidence. One must remember that factual determinations in civil litigation rests upon probability, not certainty. *Virgin Islands Labor Union v. Caribe Const. Co., 343 F. 2d 364 (3d Cir. 1965).* The motion for amended findings of fact will be denied.

NEW TRIAL

This Court recognizes the sensitive nature of discrimination cases. This Court would not hesitate for a moment to grant plaintiff a new trial on the Title VII action if it harbored the slightest reservation in regard to the law which was applied, the factual conclusions which were reached, or if there was any indication that plaintiff possessed new evidence of any substance. As it stands, however, plaintiff has been afforded full opportunity to air his grievances, and to present all evidence that he can muster. The evidence has been carefully weighed in two separate processes, and the applicable law is clear. The court is convinced that plaintiff was treated no differently than any other employee would have been treated in the same or similar circumstances, and that even if some small difference in treatment can be discerned which could be categorized as discriminatory, that difference in treatment was not colored by racial overtones. The court's impression that the reason for plaintiff's problems while employed at Honeywell, which was reached after hearing and observing the witnesses and reading all exhibits, as stated in the Memorandum Decision, remains unchanged. The court is not persuaded that the decision reached is a miscarriage of justice, or that a different result would be reached after another trial.

Plaintiff's motion for a new trial on the cause of action premised on Title VII will be denied.

WHEREFORE, It is—

ORDERED:

That plaintiff's motions shall be, and hereby are, in all respects, denied.

BY THE COURT:

/s/ Patrick J. McNulty
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

CIVIL CASE NO: #3-81-343
DATE: 10-14-82

Alvin W. Smith,

Plaintiff,

vs.

Honeywell, Inc. et al,

Defendant.

Clerk's Notice under Rule 77(d) Federal Rules of Civil Procedure

You are hereby notified that the following was filed this date in the above mentioned action.

MEMORANDUM DECISION & RECOMMENDATION (McNulty-M; 10-8-82) that: 1) Count enter Order that defts Honeywell Info. Systems, Rietti and Ingman be dismissed as defts to claims of pltff; 2) Count V be dismissed without prejudice; 3) Count I be dismissed without prejudice; 4) Count III be dismissed without prejudice; 5) pltff's complaint against John Doe and Mary Roe be dismissed; 6) pltff's motion for relief be granted.

ROBERT E. HESS, CLERK
By /s/ _____
Deputy

STEPHEN M. GOLDFARB
610 Park National Bank Bldg.
5353 Wayzata Blvd.
Mpls., MN 55416

JAMES A. KAEHLER
Honeywell, Inc.
Honeywell Plaza
Mpls., MN 55408

UNITED STATES DISRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Alvin W. Smith,

Plaintiff,

vs.

Honeywell, Inc., a Delaware Corporation, Honeywell Information Systems, Inc., a Delaware Corporation, Ricardo Rietti, Thomas R. Ingman, Myron E. Amundson, William L. Griffin, James Remington, John Doe and Mary Roe,

Defendants.

SUBSTITUTION OF ATTORNEYS

Civil Action File No. 3-81-343

TO: THE ABOVE - NAMED COURT:

PLEASE TAKE NOTICE, that the undersigned has been substituted as the attorney for Alvin W. Smith in place of Stephen M. Goldfarb, P.A.

Dated: 10/25/, 1982

/s/ Alvin W. Smith
8143 14th Ave. So.
Bloomington, MN 55420
Attorney Pro Se

CONSENT

The undersigned hereby consents to the substitution of Alvin W. Smith, Attorney Pro Se, as the attorney for Alvin W. Smith in the above-entitled proceeding.

Dated: Oct. 25, 1982.

STEPHEN M. GOLDFARB, P A.
/s/ Stephen M. Goldfarb
610 Park National Bank Building
5353 Wayzata Boulevard
Minneapolis, MN 55416
546-8888

PLEASE TAKE NOTICE that the undersigned hereby consents to the above Substitution.

Dated: 10/25, 1982.

/s/ Alvin W. Smith

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Alvin W. Smith,

Plaintiff,

vs.

Honeywell, Inc., et al,

Defendant.

CIVIL CASE NO: 3-81-343

DATE: 12-9-82

Clerk's Notice under Rule 77(d) Federal Rules of Civil Procedure

You are hereby notified that the following was filed this date in the above mentioned action.

ORDER (Devitt - J; 12-7-82) that pltff's mo. to amend complaint is DENIED; and parties' objections to Mag's Memorandum Decision and Recommendation are overruled and the Mag's report is confirmed and the Mag's findings of fact, conclusions of law and recommendations are adopted as those of the Court.

ALVIN W. SMITH
8143 - 14th Avenue S.
Bloomington, MN 55420

DAVID A. GRABHAM
Honeywell, Inc.
Honeywell Plaza
Mpls., MN 55408

ROBERT E. HESS, CLERK
By /s/ _____
Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Alvin W. Smith,

Plaintiff,

vs.

Honeywell, Inc., et al,

Defendant.

CIVIL CASE NO. 3-81-343
DATE: 12-15-82

Clerk's Notice under Rule 77(d) Federal Rules of Civil Procedure

You are hereby notified that the following was filed this date in the above mentioned action.

CONSENT TO PROCEED BEFORE U.S. MAGISTRATE WI. APPEAL TO CIRCUIT COURT of Appeals and Order of Reference (Devitt - J) that this action is referred to Mag. McNulty for purpose of conducting all further proceedings and entry of judgment.

ALVIN W. SMITH
8143 - 14th Avenue S.
Bloomington, MN 55420

DAVID A. GRABHAM
Honeywell, Inc.
Honeywell, Plaza
Mpls., 55408

ROBERT E. HESS. CLERK
By /s/ ———————
Deputy

. . . presented in evidence during the course of this trial. Therefore, I feel it is improper to suggest to the jury that damages can be awarded for those elements, and we ask the Court to exclude such instruction from the jury.

THE COURT: The objection is noted.

Any further objection, Mr. Kaehler?

MR. KAEHLER: No further objections, Your Honor, at this time.

THE COURT: Mr. Smith.

MR. OHNSTAD: I'm going to state the objections, Your Honor.

The instructions are acceptable except the plaintiff objects to the instruction that's on Page 30 which deals with the burden of proof of the plaintiff in a 1981 case, and the specific objection is that the instruction states that the plaintiff has the burden of proving by preponderance of the evidence that the defendant had a racially discriminatory purpose or motive and it also states and we object to the statement as well, that it is not sufficient for the plaintiff to simply show that the plaintiff is black and that the plaintiff was treated differently.

THE COURT: The objection is noted.

Office-Supreme Court, U.S.
FILED
NOV 27 1984
ALEXANDER L. STEVAS,
CLERK

(3)

NO. 84-594

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALVIN W. SMITH, PETITIONER,

VS.

HONEYWELL INC. AND
HONEYWELL INFORMATION SYSTEMS INC.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO RESPONDENTS BRIEF IN OPPOSITION

Petitioner, pro se,

Alvin W. Smith
8143 14th Avenue South
Bloomington, Minnesota, 55420
612-854-2726 (Home)
612-482-4870 (Work)

54pp

QUESTIONS PRESENTED

1. Whether and to what extent did the Respondents' statement of the case not represent the evidence.

2. Whether and to what extent did the Respondents not accurately state the reasons for Petitioner being forced to act pro se.

3. Whether and to what extent did the Respondents not clearly state the circumstances of the unjust disparagement of the Petitioner pro se while on the witness stand by the U.S. Court.

4. Whether and to what extent did the Respondents not clearly show that the U.S. District Court did not present the entire case to the jury.

5. Whether and to what extent did the Respondents not show the deviation from evidence in the U.S. District Court's Findings of Fact under Title VII, 42 USC Sec. 2000e et seq. (Civil Rights Act of 1964).

6. Whether and to what extent did the respondents misrepresent the error when the U.S. District Court instructed the jury to determine the state of the mind rather than examine the purposeful acts under the Civil Rights Act of 1866 (42 USC Sec. 1981).

THE PARTIES

The Petitioner

The petitioner, Alvin W. Smith (hereinafter referred to as petitioner or Smith) is a Vietnam War veteran honorably dischaged as a Captain in the Military Police Corp. The petitioner has a B.S. in mathematics, some graduate applied mathematics, a M.B.A. from the University of Minnesota, and a J.D. from William Mitchell College of Law in Minnesota. Petitioner is not an attorney but rather an expert in computer business. Petitioner is presently employed by Control Data Corp. in Minnesota as a consultant in supercomputer software development. Petitioner is a member of the Negro Race.

The Respondent

The respondent Honeywell, Inc. and its wholly owned subsidary Honeywell Informaton Systems, Inc. (both hereinafter referred to as respondents or Honeywell) is a multinational Minnesota based Corporation. Respondent is a major and influential employer in Minnesota.

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IN THE SUPREME COURT OF THE UNITED STATES

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RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO RESPONDENTS BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 735 F.2d 1067. The opinion of the United States District Court for the District of Minnesota is unreported. Both opinions have been filed in the briefs of the petitioner and respondents.

JURISDICTION

The judgement of the U.S. Court of appeals for the Eighth Circuit (hereinafter referred to as the Court of Appeals) was entered on June 4, 1984. The denial of the petition for rehearing in the Court of Appeals was entered on July 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). This petition is submitted because:

1. The Court of Appeals has sanctioned a lower court's departure from accepted judicial procedure and fairness necessitate a call for the U.S. Supreme Court's power of supervision.

2. The Court of Appeals has decided not to address an important question of federal law and which should be decided by the U.S. Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Civil Rights Act of 1866, 42 U.S.C. Sec. 1981 (hereinafter referred to as Section 1981) is a codification of the

Thirteenth Amendment to the U.S. Constitution provides:

> "All persons within the jurisdiction of the United States shall have the same right...to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishemnts, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

2. Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Sec. 2000e. et seq. (hereinafter referred to as Title VII) provides:

> "Sec. 703. (a) It shall be unlawful for an employer...(1)to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his composition, terms, conditions, or privileges of employment, because of such individual's race, color...or (2) to limit, segregate or classify his employees...in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, be cause of such individuals race, color, religion, sex, or national orgin."

STATEMENT OF THE CASE

This is an individual action for race discrimination for violation of Title VII and Section 1981. Petitioner brought action against respondents for fraudent employment, wrongful termination and employment discrimination.

Petitioner was fraudently hired by the respondents from a competitive company. He suffered disporportinate racial discrimination in assignment of responsibilities, office space, preformance appraisals, salery treatment, promotional opportunities, use of employment benefits (i.e. vacation, etc.), job responsibilities, another segregated office and involuntary termination. There is no direct evidence of petitioner not performing his job.

On August 12, 1980, petitioner filed a charge of discrimination against respondents with the U.S. Equal Employment Opportunity Commission (hereinafter referred to as the EEOC). Honeywell (a large government

contractor) refused to answer the questioner of the EEOC. Whereupon, the frustrated EEOC on April 14, 1981 not able to investigate the complaint in a timely fashion, issued a Right to Sue under Title VII.

This case was filed on June 2, 1981 by petitioner's then attorney, Mr. Steven M. Goldfarb, in the United States District Court in Minneapolis, Minnesota. The case was assigned to U.S. Judge Edward Devitt (hereinafter referred to as Judge Devitt) of the U.S. District Court in St. Paul Minnesota. On May 14, 1982, the case was referred to U.S. Magistrate Patrick C. McNulty (hereinafter referred to as the Magistrate) of the U.S. Court in Duluth, Minnesota.

The complaint initially consisted of five counts of employment related matters. In early 1982, Judge Devitt dismissed Count V (Unlawful Termination) as being beyond the court's pendant jurisdiction. On October 13, 1984, the Magistrate recommended dismissing Counts I (Fraudent Em-

ployment), III (minnesota Human Rights) and V (Minnesota Statute) as beyond the Court's pendant jurisdiction.

On October 25, 1982 (the last date to move against the Magistrate's recommendation), petitioner's attorney of 18 months abandoned this case without the permission of the court and in violation of the employment contract. Petitioner could not find another attorney willing to take the case close to trial and was forced to act as his own lawyer in all further legal action in this case. Petitioner is not a lawyer but rather a computer expert. The incompetent presentation at trial was noted by the Magistrate.

On December 6, 1982, Judge Devitt ruled against petitioners motion against the magistrate's recommendations. All of the counts dismissed in federal courts are being litigated in state courts.

On December 14, 1982, this action was referred to the Magistrate for trial with appeal to the Court of Appeals. The trial started on February 7, 1983 and lasted for

8 days. Count II (Title VII) was tried to the bench and Count IV (Section 1981) was tried to the jury.

Petitioner was forced to represent himself at trial. Petitioner did hire a lawyer to question petitioner while he was on the witness stand and provide sporadic trial consultation. Respondents was represented by 2 full time attorneys.

Petitioner lost the jury verdict 7 to 8. The Magistrate subsequently ruled against the petitioner for the portion tried to the bench.

Petitioner thereafter moved for judgement notwithstanding the verdict, for new trial of the 1982 issue, to amend the Court's findings of fact and for new trial of the Title VII issue. On May 5, 1983, these motions were denied by the Magistrate.

Petitioner then appealed to the Cour of Appeals. On June 4 1984, after not having oral argument, the appeal was summarily denied. Petitioner then requested the Court of Appeals rehear the evidence of errors

in the findings of fact and rehear en banc the issue of proof of Section 1981 discrimination. On July 17, 1984 the Court of Appeals denied both of these request for rehearing.

REASON FOR GRANTING THE PETITION

Petitioner submit that the U.S. Supreme Court should exercise its power of supervision over a lower court to insure that; (!) a district court must not condone an attorney abandoning his client without the court's permission thereby prejudicing his client's right of action, (2) a district court must not make disparaging remarks in the presence of the jury which would have the effect of influencing the jury against the individual forced to represent himself, (3) a district court must present to the jury all of the issues in the complaint supported by evidence and not a substantial subset, (4) a district court's findings of fact must be based on the evidence presented at trial, and (5) a district court in a Title VII case must consider evidence of

pretext.

In general, each of the above items for consideration has a potential of falling under the penumbra of judicial discretion when taken as a whole has the effect of a departure from the standard of substantial justice.

Petitioner further submits that in Section 1981 cases, the jury must be directed to evaluate the purposeful harmful acts of discrimination and not the mental state of the discriminator.

1. THE RESPONDENT'S STATEMENT OF THE CASE DOES NOT REPRESENT THE EVIDENCE.

Respondents' statement of the case is based upon the U.S. Magistrate's findings of fact. As shown in the petition and later in this reply, those findings of facts are erroneous because it simply does not consider the evidence in the record. Therefore respondents statement of the case is also erroneous.

Of particular note is respondents' statement on page 6 that there were "business reasons" to justify their behavior. It was

shown in the petition (pages 35 to 41) and in this reply (pages 23 to 26) that these pretextual business reasons represeted a departure from Honeywell's policies and treated a black employee substantially different than a white employee.

Therefore this Court should not consider Respondents statement of the case as an accurate representation of the evidence in the record.

2. THE RESPONDENT DID NOT ACCURATELY STATE THE REASON FOR PETITIONER BEING FORCED TO ACT PRO SE.

On page 7, Honeywell stated "the petitioner...voluntarily consented to substition of himself for his attorney". How does Honeywell know what took place between the petitioner and his attorney? That relationship is supposed to be confidential.

In fact, the respondent was forced to represent himself because his attorney refused to preceed with this case. On page 30 of the appendix is the motion in which the petitioner informed the District Court that his attorney refused to proceed with this

case and was forced to act pro se. The attorney never asked the permission of the court nor was there any steps taken on the part of the District Court to stop the misrepresentation.

It is a long standing rule that leave of the court is necessary before an attorney may withdraw from a case, U.S. v. Curry, 47 U.S. 106 (1848). The courts and the Code of Professional Responsibility require the attorney to seek permission from the Court and take steps to avoid foreseeable prejudice, Summers v. Thompson, 444 F.Supp. 312 (Tenn 1978), Berry v. Berry, 388 A.2d 108 (Mo. 1978), Ashbrook v. Ashbrook, 366 N.E. 2d 667 (Ind. App. 1977), Code of Professional Responsibility DR 2-110(A).

The court must preserve the fairness of the adversary proceedings by requiring the attorney to seek its permission to withdraw from the case and to make the withdraw without prejudicing the client. Here the attorney abandoned the case just when a critical moition was to brought to the Court.

The U.S. District Court did not preserve the fairness and integrity of the adversary proceedings by permitting the attorney to abandon his client without its permission and in prejudice to his client's action.

Without adequate representation on both sides of this adversary proceeding the Court is not in a position to determine the facts of the case. This is illustrated here in the errors in the findings of fact.

The respondent stated on page 8 that the petitioner did not raise the issue on appeal. Rule 4(a)(4) of the Federal Rules of Appellate reads as follows:

> (4)If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgement under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact whether or not an alteration of the judgement would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgement; or (iv) under Rule 59 for a new trial,,,"

There is no provision for raising the issue of unfairness because the U.S. District Court permitted the attorney to abandon the case. Therefore the notice of appeal was

brought within the Federal Rules of Appellate Procedure by the pro se litigate. The prejudicial misconduct of the attorney was brought up for review in the Appellate Brief and the Petition for Rehearing (see pp 49-53 in the appendix). The U.S. Court issued a summary opinion in which the misrepresentation was not addressed.

Petitioner is not an attorney but rather a computer expert and is prone to misrepresent himself in these forced conditions like anybody else. This issue was presented to the lower courts. The respondent statement is not correct.

3. THE RESPONDENT DID NOT CLEARLY STATE THE CIRCUNSTANCES OF THE UNJUST DISPARAGEMENT IF THE PETITIONER PRO SE WHILE ON THE WITNESS STAND BY THE U.S. DISTRICT COURT.

On page 9 the respondent stated "the judge's reference to possible contempt came only after the petitioner continued failure to be responsive". Petitioner's answers were responsive to the best of his ability under the circumstances of being on the witness stand while being forced to act pro se and being questioned by an attorney not

a party to the case (he was there part time).

Fairness in Court demand that all parties be treated the same. An illustration of the unfairness is the testimony given by Mr. Griffin (the Honeywell supervisor) and referred to in the petition on page 70 but not published. That citation may be found in the appendix here on page 33 . In that testimony, Mr. Griffin (an attorney) was unresponsive to more that 20 question. in a short period of time. Yet there was no denouncement before the jury by the U.S. District Court for the behavior of the Honeywell supervisor. The U.S. District Court must be an impartial forum for the presentation of the evidence to the jury.

The respondent next state on page 9 that no authority was cited to support the petitioner claim of the unfair disparagement by the U.S. District Court. The implication being that it is alright for a U.S. District Court to disparage one of the parties in the action if no authority is cited. Honeywell is again incorrect. The authority is

appropriately cited on page 20 of the petition to this Court. Honeywell's statement is simply not true.

In summary, a U.S. District Court may not discredit or credit all or part of a witness and should not instruct one of the parties to reveal his trial tactics to the other side during trial.

4. THE RESPONDENT DID NOT CLEARLY SHOW THAT THE U.S. DISTRICT COURT DID NOT COMPLETELY PRESENT THE CASE TO THE JURY.

Honeywell stated on page 9; "A party is not entitled to have a jury instructed in a particular language of its choice". Obviously, the petitioner did not require that the jury be instructed in the "particular language of his choice". The petitioner (and the petition) simply asked that all of the issues in the complaint be presented to the jury.

The respondent stated on page 10 the "instructions taken as a whole were adequate to submit the substance of Smith's unlawful claim to the jury". As clearly shown in the petition, only 50% of the issues in the

complaint was presented to the jury. The issues which were not presented and potentially remain outstanding are:

1. Discrimination in compensation and benefits and the lack of a performance appraisal (discussed here on page 24 of this brief).
2. Discrimination in promotional opportunity (discussed here on page 24 of this brief).
3. Discrimination in responsibilities.
4. Discrimination in hiring.
5. Discrimination in use of vacation time.

These are not minor as Honeywell would have this Court believe but are major importance in employment discrimination. They are the types of acts the U.S. Congress specifically prohibited in Title VII with the words "discrimination in compensation, term, conditions and privilege of employment". In essence the major substance of the complaint was not even presented to the jury for consideration.

It is widely held that the court has a duty to submit all of the issues to the jury. Ranney v. Barlow, 112 U.S. 207 (1884), Herman v. Midland A.G. Service, Inc., 264 N.W.2d 161 (Neb. 1978), Cole v. Woods, 548 S.W.2d 640 (Tenn. 1977), Hasson v. Ford Motor Co., 564 P.2d 857 (Cal. 1977).

It is clear that there is a need for this Court to emphasize the necessity for the district court to submit all of the issues in a complaint to the jury and not some minor subset of chosen issues as recommended by Honeywell.

5. THE RESPONDENT DID NOT SHOW THE DEVIATION FROM EVIDENCE IN THE U.S. DISTRICT COURT'S FINDINGS OF FACT IN THE TITLE VII CASE.

Honeywell stated on page 11 that the petitioner's request that the findings of fact match the evidence "does not present a special or important issue to the court". Petitioner submit that the findings of fact must be supported by evidence and does present the special and important issue of constitutional fairness. The fundemental issue is justice. This Court should note

that Honeywell did not cite testimony to support the findings of fact nor did Honeywell cite testimony to support their business reason for their unconstitutional conduct.

One of the issues in the complaint was that Honeywell discriminated against the petitioner in compensation benefits in that the petitioner did not receive a Performance Appraisal in accordance with company policy during the last 22 months of employmenr. The U.S. District Court did not even address this issue in its findings of fact nor did the District Court present this issue to the jury.

Yet evidence was presented that Mr. Griffin (the Honeywell supervisor who is an attorney) gave the petitioner a Honeywell document which stated that a Performance Appraisal will be given at least once a year (Reference R1 page 40 in the appendix), that plaintiff's Caucasian coworker, Mr. Maidman, testified that he received a performance appraisal at least once a year (Reference R2 page 41 in

the appendix), that petitioner did not receive a performance appraisal within the last 22 months of employment (Reference R3 page 42 in the appendix), that the petitioner received lower and slower salery increases and the Caucasian co-worker received faster and higher salery increases (Reference R4 page 43 in the appendix), that at all times, petitioner was doing his job in a competent and noteworthy manner (Reference R5 page 45 in the appendix), and that the lack of performance appraisal would impede promotional growth (Reference R6 page 47 in the appendix).

Here there is a deviation from Honeywell policy and a difference in treatment of a black employee. The ommission of this issue in the findings of fact is also an error.

Honeywell on page 11 attempts to hide behind a high standard of review by stating "a findings of fact is not reversible unless it is clearly erroneous, nor is it necessary for the judge to make specific findings on

all facts or refer to every item of evidence". Clearly Honeywell would like to have this high standard of review to cover their mistreatment of the petitioner.

The U.S. Supreme Court stated in U.S. v. Gypsum Co., 333 U.S. 354 (1947) the following:

> "The findings were never conclusive however. A findings is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Here the mistake and error is glaring even for those who are not pro se litigants. Petitioner therefore submits that this Court must emphasize that Findings of Fact must be supported by evidence and the accuracy of the Findings of Fact does represent a special and important issue of fundemental justice.

6. THE RESPONDENT MISREPRESENTED THE ERROR IN THE SECTION 1981 JURY INSTRUCTION.

On page 12, Honeywell stated "the petitioner places great emphasis on his contention that he show the respondents intended (ie. had a purpose or motive)".

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In the petition there is an argument that there is a difference between intention and purposeful act. The basis of this argument is that by use of the word "intent" the trier is directed to evaluate the state of the mind of the perpetuator whereas in the use of the word"purposeful act" the trier is directed to evaluate the purposeful act of the perpetuator. Honeywell would have this Court believe that the act and the state of mind are ne and the same.

Clearly an individual may commit an act of harm against another without consciously being aware of their behavior. Yet the harm remains with the receiving party.

It is the act of harm (conscious or not) of racial discrimination which is unconstitutional under Section 1981. A culture may exist in which the act of racial discrimination will take place in the normal course of events without conscious awareness. Yet, there is still a victim.

Therefore Honeywell argument that intent is the same as purposeful act is not correct.

CONCLUSION

There are undoubtedly other individuals in this country without the education or fortitude to raise these issues of misrepresentation and have become victims of the lack of substantial justice. Therefore the petition for writ of certiorari should be granted.

Respectfully submitted.

Dated:
November 26, 1984

Alvin W. Smith
Petitioner, pro se
8143 14th Avenue South
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55420
612-854-2726 (Home)
612-482-4870 (Work)

APPENDIX

Here set forth successively are portions of the motion against the U.S. Magistrate's Recommendations, relevant portions of the trial transcript, relevant portions of the Appellant Brief, and relevant portions of the Petition for Rehearing.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

Alvin W. Smith, Plaintiff

vs.

Honeywell, Inc., et al., Defendants.

MEMORANDUM OF LAW
Civ. No. 3-81-343

Due to the critical timing of this motion and the unprofessional behavior/ performance of the plaintiff past council "Steven M. Goldfarb", plaintiff has found it necessary to act as attorney "pro se" until such time as suitable council may be obtained...

Plaintiff brings this motion and not his past attorney Steven M. Goldfarb because the attorney in his desire to remove himself from this case refused to represent plaintiff in this time critical matter. This refusal is a violation of the Code of Professional Responsibility and mislead United States Magistrate Patrick McNulty

recommendation in his Memorandum Decision and Recommendation. A copy of plaintiff complaint to the Minnesota Lawyer's Board is attached.

Had plaintiff's past attorney acted as required, a motion to amend the complaint to include diversity jurisdiction would have been heard ...

Unfortunately, Mr. Goldfarb refused to make the motion at that time and subsequently refused to both cure the service defect and to seek to amend the Memorandum Decision and Recommendation...

This is not just a race discrimination case but rather a case between a conscientious employee and an abusive rich powerful employer. The employer, Honeywell Inc., has legions of lawyers and plenty of money to defend it's abusive tactics against it's employees. The plaintiff while rich with education has limited financial resources to prosecute Honeywell et al. in both Federal and State Courts. Yet, Plaintiff's sense of moral ethics dictate that not even a large

powerful corporation is above the law and must be held responsibility for it's wrong-doings in this society. As such, plaintiff request that the Court rule favorable upon these motions.

Dated:October 25, 1982.

/s/ Alvin W. Smith

TRIAL TRANSCRIPT: Vol. II, pg. 4, 11/8/83

Q:Mr. Griffin, now refer to Plaintiff's Exhibit Number 11.

A;Yes....line 7

Q:Excuse me. That appears to be a tuition reimbursement request?

A:Yes.

Q:And that was prepared by Mr. Smith?

A:Yes.

Q:They were signed by Mr. Smith, by you and Mr. Smith and others?

A:Technically they are not signed. Your name is printed on those.

Q:Was a signing or printing required?

A:Doesn't say...page 6 line 19

Q:Mr. Griffin, looking at the Plaintiff Exhibit Number 11, just for the sake of exercise canyou tell us the circumstances of the initial reauest that you received from the plaintiff?

A:What do you mean by circumstances?

Q:Was the plaintiff to submit to you a number of late tuition request, or was just one late tuition request submitted to you?

A:It was about the third, as I recall. It was after the fact rather than before the fact.

Q:So there was a third one over a period of how much time?

A:Three out of perhaps seven or eight in a period of about two years....line 13...

Q:Did the Honeywell policy require that absoultely the tuition request had to be submitted immediately after taking of the test, or immediately after receiving the exam, the grades?

A:Neither. The Honeywell policy stated the request had to be approved by the superior prior to the employee taking the course.

Q:Did Honeywell policy also require that that request had to be approved by the supervisor after taking the course?

A:Yeah, when the grades--if the employee passed the course with a grade high enough to qualify for the tuition reimbursement, the same request had to be submitted. It's a two-part form...line 21...

Q:Mr. Griffin, looking at Plaintiff's Exhibit

Number 11, the tuition request, would you look on that form, the first form and give us the date of submission to you for the request prior to taking the courses?

A:It's not indicated. There are dates on here but there is no time stamp. I couldn't tell you when these were submitted.

As you know, we had one incident where you predated one of these forms...line 8...

Q:Would you give us the date of your first signiture, one signiture which you made on that form?

A:There is no date next to my signiture on the first form. There is on the second, 7-28-80...page 10 line 1...

Q:Mr. Griffin, for the sake of economy here and our time, could you give us the date of the initial request to you and the date of approval?

A:For which one, sir?...line 14...

Q:Then we will look just at one transaction which we will one request for tuition.

What was the date of the initial request to you for the tuition, that one

form?

A:Any particular one of these forms? There is--

Q:The first form, the first series, the first set of transactions.

A:There is no date on either one of these first two forms on when they were submitted.

Q:Is the first two forms considered to be a part of the transaction which is addressed in the next form, the third form?

A:No.

Q:Mr. Griffin, which form has a date on it?

A:They all have dates, but they have dates on when the courses were scheduled, not when the forms were submitted and approved.

Q:Mr. Griffin, what--could I have the form? Which form has a date on when they were submitted and approved?

A:There is no dateon when they were submitted.

Q:Is there a date next to your name, your signiture?

A:Yes, that's the date when they were approved finally.

Q:Is there a date next to the date of submission?

A:No.

...line 15...

Q:Mr. Griffin, you just testified a short time ago that you have a form there which has an approval date on it.

A:Final approval.

Q:What is the date given next to that date for final approval?

A:That date is meaningless unless you reference it to the semester for the course being taken.

Q:When's the date given next to your name for final approval?

A:I finally approved the date next to my name, and there are two dates there, and the final date is 7-28-80.

Q:And you said a final date. Is there another date there also?

A:There is a whole bunch of dates. There is one for 1-7-80, one for 5-17-80, another one for 1-11-80...line 17...

Q:Mr. Griffin, looking at the form which Ijust handed back to you, which is Plaintiff Exhibit Number 11, what's the date that's-- does it show on the form?

A:This form is not Plaintiff Exhibit 11.
Plaintiff's Exhibit 11 is seven individual forms.

Q:While looking at the document which I handed to you which is identified as Plainitff Exhibit Humber 11, and the pages are setting in front of you.

A:It's not marked as a page. Do you want to mark it as a page?

Q:I don't want to make as a page. Looking at the page that's sitting in front of you does it show the date that the course was started for Municipal Court Practice?

A:Yes.

Q:What is the date?

A:1-7-80.

Q:Does it show the date completed for Municipal Court Practice?

Q:What is that date?

A:5-17-80.

Q:Does it show the date it was submitted for preapproval?

A:No.

Q:Looking in the lower right-hand corner, Mr. Griffin, where your signiture is--

A:Yes.

Q:-- does it show the date of preapproval?

A:No....page 14 line 2...

Q:Does it show the date of preapproval?

A:No.

Q:Mr. Griffin, I believe you are looking at that form there and it shows a date of perapproval is 1-8-80.

A:The left-hand side, yes excuse me, it does show preapproval is 1-8-80.

Q:Do you see the box where it says preapproval?

A:Yes.

Q:Beneath that box do you see your signiture?

A:Yes, in that box, yes.

Q:And do you see right next to that box the date which you wrote in of 1-8-80?

A:Yes.

Q:Looking to your right-hand side, the date of approval, what is that date?

A:It's a little illegible. It looks like 7-28-80.

. . .

TRIAL TRANSCRIPT

Reference R1

Vol. II page 91 line 7:

Q:May I approach the witness?

Mr. Griffin, showing you what's been marked as Plaintiff's Exhibit Number 21, what's the subject of the note attached to that exhibit?

A:This is from me to you. It says-- it's a whole raft of documents.

Q:What does the note say?

A:"Per discussion, please get back to me at your conevnience with any questions. WLG."

...page 92 line 2...

Q:Why did you send that note to Mr. Smith?

A:To have him read it.

Q:Was that so that he could become aware of the new policy for performance appraisals?

A:Probably one of the reasons, yes.

...line 8...

Q:What is the title of that book?

A:Employee and Supervisory Guide to Performance Appraisals.

Q:Looking in that guide, looking at item

number 5, what does item number 5 state?

A:"The quarterly and/or annual reviews of these objectives or goals is a form of performance appraisal but does not do the complete job (and employee perceptions confirm this)."

...Page 93 line 15...

Q:"When the supervisor has completed the documentation, it is given to the employee for his/her signature."

A:That's a guideline.

Q:How many times did you give a performance appraisal from Mr. Smith for his signature?

A:I will have to stand on I think either two or three times....

...line 24...

Q:During the entire two years.

A:At least twice, maybe three times.

Reference R2

Vol. II page 172 line 1 (Mr. Maidman)

Q:Did Mr. Griffin write your performance appraisals?

A:I believe he would.

Q:Were they given to you on a yearly basis?

A:At least on a yearly basis.

Reference R3

Vol. II page 93 line 18 (Mr. Griffin)

Q:How many times did you give a performance appraisal from Mr. Smith for his signiture?

A:I will have to stand on I think either two or three times...

...line 24...

Q:During the entire two years.

A:At least twice, maybe three times.

...Page 96 line 20...

Q:Thank you

Mr. Griffin, reviewing that Exhibit 12, would you see if you could locate performance appraisals that you gave Mr. Smith?

A:There's about four of them here.

...Page 97 line 25...

Q:Which types of reviews?

A:We call them performance appraisal salery reviews. It's the same thing.

Q:This is a salary review; is that correct?

A:They're performance appraisals...

...Page 98 line 18...

Q:Was that signed by Mr. Smith?

A:No. It's signed by myself and my supervisor Mr. Remington.

Q:So there was no actual verbage communication which required a signiture on that, those four forms that you addressed?

A:These four, no.

Reference R4

Vol. VII page 163 line 21 (Mr. Amundson Personnel)

Q:Mr. Amundson, looking back from the present to the past, what is the most recent salary recommendation in that form, the most recnt sir?

A:The most recent is June 16, 1980.

Q:What percentage is that increase?

A:The percentage increase is 5.8 percent.

Q:How many months is that?

A:4 1/2 months....

...Page 164 line 8...

Q:In 4.5 months. Just again was that June 16, 1980 for that increase?

A:You mean for Robert Maidman?

Q:Yes, sir.

A:The date on that is June 16, 1980.

Q:Looking at Plaintiff's Exhibit-- I mean Defendants Exhibit AA, I understand that is the salery change notice for Mr. Smith?

A:That is correct.

Q:What is the salary increase in that one, sir, percentage

A:The percentage is 4.85percent.

Q:4.85, and how many months sir?

A:8.5 months.

Q:Going back again to Mr. Maidman's salary, would you look at the next salary increase, sir?

A:Yes.

Q:And when did that take place?

A:Effective date was February 1st, 1980.

Q:How much was that salary increase?

A:13 percent.

Q:How much time, sir?

A:10 months.

...line 10...

Q:Defendants' Exhibit Z is for Mr. Smith. What's amount of increase in that one?

Let me rephrase that.

When was that increase given?

A:That increase was given on November 1st, 1979.

Q:How much was that increase?

A:Percent of dollars?

Q:Percent, sir.

A:8 percent.

Q:How much time?

A:12 months.

Q:Going back to Mr. Maidman's documents, are there any other salary increases in that document?

A:No, there are not.

Reference R5

Vol. II page 168, Line 20 (Mr. Maidman)

Q:To your knowledge, do you think Mr. Smith did his job?

A:It was my opinion that he handled his responsibilities competently, the ones I knew of. Never having seen a job description, so, I wouldn't be totally knowledgeable of what they all were.

Vol. III page 48 line 12 (Mr. Jensen Corporate Counsel

Q:Mr. Jensen, at all times when working with Mr. Smith, was he professional and competent in your perspective?

A:I would say yes. Based on my contact with Mr. Smith, I would say that.

Q:Did he treat you in a friendly and courteous manner?

A:Yes, sir.

Q:Did you observe him treating others in a friendly and courteous manner?

A:Yes.

Q:In your trips to Washington, D.C. in working with the United States Government, did you observe him working with these people?

A:Yes.

Q:Did he work efficiently and effectively with those people?

A:Yes, I would say so.

Q:Did he treat them in a courteous and friendly manner?

A:Yes, sir...

Testimony Robert Maynard Honeywell General Counsel and Mary McCormick Honeywell Counsel

Reference R6

Vol. III page 10 line 2 (Mr. Amundson Director of Employee Relations)

Q:Let me ask the question again.

Does Honeywell have a performance appraisal for employees?

A:Does it have?

Q:Yes.

A:We make a recommendation based on the supervisor's discussion on the performance of the employee.

Q:Okay. Now this performance appraisal will have some impact upon the salary of that employee; is that correct?

A:That is correct.

Q:This performance appraisal will also have some impact upon the promotional opportuities of the employee is that correct?

A:That is correct.

...Page 11, line 14...

A:A supervisor's performance appraisal will affect the career of the employee is what I testified to a moment ago.

Q:Okay. Mr. Amundson, In Honeywell Corporation does the supervisor's comments about an employee affect a potential transfer of the employee?

A:Are you using comments in the context of performance appraisal?

Q:Yes.

A:I just testified to that a second ago. Yes, a supervisor's performance appraisal can impact the career of an employee.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Alvin W. Smith, Plaintiff-Appellant

vs.

Honeywell, Inc., et al., Defendants-Appellee.

BRIEF OF PLAINTIFF-APPELLANT
No. 83-1744-MN

Page 1

. . .

On October 25, 1982 (the last day to amend the U.S. Magistrate's recommendation), plaintiff's attorney, Steven M. Goldfarb, abandoned this case. The plaintiff thereafter acted in a "pro se" capacity.

. . .

Page 34

IV THE U.S. DISTRICT COURT SHOULD HAVE GRANTED NEW TRIAL FOR SECTION 1981 TRIED TO THE JURY BECAUSE:
D. THE PLAINTIFF PRESENTATION OF HIS CASE TO THE JURY WAS PREJUDICED BY THE DISPARAGEMENT BY THE U.S. MAGISTRATE.

SUMMARY:

During the course of the jury trial

the U.S. Magistrate disparaged plaintiff while plaintiff (who was acting in a pro se capacity)was on the witness stand. The result of this was to prejudice the plaintiff case in the minds of the jury...

Argument

Due to rather unusual circumstances, plaintiff found himself in the position of having to act in a "pro se capacity during the conduct of the trial...

. . .

Dated:February 6, 1984

/s/ Alvin W. Smith

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Alvin W. Smith, Plaintiff-Appellant

vs.

Honeywell, Inc., et al., Defendants-Appellee.

APPELLANT'S PETITION
FOR REHEARING
No. 83-1744-MN

. . .

Page 12

E. SHOULD PLAINTIFF'S INADVERTENT MISTAKE OF NOT RAISING A RULE 51 MOTION BE HELD AGAINST HIM WHEN HE WAS FORCED TO ACT AS HIS OWN ATTORNEY AND THERE WERE OMMISSIONS IN THE JURY INSTRUCTIONS?

1. Summary:

Plaintiff was forced to act as his own lawyer during trial. He had only sporatic legal consultation. His failure to raise objections to the jury instructions was due to his lack of knowledge about the Rule 51 provisions. If he knew about the rule he would have raised the appropriate objection.

The Court of Appeals should consider the Magistrate omission as a fatal error.

2. Body:

Plaintiff's attorney of 18 months suddenly abandoned the case just before trial. He abandoned the case without permission of the Court and in violation of the employment contract. He abandoned the case at a time when plaintiff was forced to immediately take over the case pro se to make a timely motion.

Plaintiff could not find an attorney to take over the case after 18 months of discovery and just before trial. Plaintiff was therefore forced to go to trial pro se and make all subsequent motions.

On the day of the trial, plaintiff managed to hire an attorney as an consultant. On page 2 of his Findings, the Magistrate rightfully stated that plaintiff was "assisted by experienced trial counsel only sporadically". This underrepresentation was manifested by errors at trial, errors in motions, and all subsequent briefs.

Plaintiff is a computer expert and not an attorney.

. . .

Plaintiff not being an attorney was not even aware of this objection. The objection would have been made had he been aware of its existance. Indeed, the plaintiff proposed jury instructions contained the correct structure...There all ten of the issues are presented.

The plaintiff request that the Court of Appeals review again his concerns about the exclusions in the jury instructions by giving him the benefit of the doubt that he would have made the correct procedural objection had he been aware of their existance. As stated at the start of this brief, it is very difficult to present a case when one is forced to act as his own attorney while not being a professional attorney but rather a computer expert....

Dated: June 24, 1984

/s/ Alvin W. Smith